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CASES,

WITH

OPINIONS OF EMINENT COUNSEL,

IN MATTERS OF

LAW, EQUITY, AND CONVEYANCING:

ALPHABETICALLY ARRANGED

AND

DIGESTED UNDER DISTINCT HEADS:

AND CONTAINING

A VARIETY OF SPECIAL CASES

ON THE SUBJECTS OF

ADVOWSONS,
BEQUESTS,
CONTINGENT REMAINDERS,
CONTRACTS,
COPYHOLDS,
DEVISES,
EXECUTORS,
FINES,
LEASES,
MORTGAGES,
POWERS,
RECOVERIES,
TITHES,
TRUSTS,
USES,
WILLS,

AND OTHER IMPORTANT BRANCHES OF LAW.

VOLUME THE SECOND.

DUBLIN:

PRINTED FOR W. JONES, NO. 86, DAME-STREET,
AND H. WATTS, NO. 3, CHRIST-CHURCH-LANE.

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LEASES.

Case 1. A parole-leaſe having been granted for ſeven years—Mr. Johnson's Opinion, Whether it is valid by 29 Cha. II. for three years? and Whether, if void, ſuch leſſee, holding over after notice to quit, is within the penalties of 4 Geo. II.?

JENKIN THOMAS mortgaged his eſtate to Morgan Thomas, clerk, for 850l. and ſoon after died, leaving Iltid Thomas his ſon, an infant, intitled to the equity of redemption thereof as his only ſon and heir.

On the death of the ſaid Jenkin Thomas, one Thomas Evans, the infant's uncle, (being his mother's brother, ſhe dying in the life-time of the ſaid Jenkin Thomas her huſband) took upon him the management of the eſtate as guardian to the infant, and received the rents thereof for two years, and let it out to ſeveral tenants; amongſt whom was one Watkin David, to whom the ſaid Thomas Evans let two cloſes at the yearly rent of ſix pounds and ten ſhillings, for the term of ſeven years (whereof two expired at Lady-day laſt, O. S.).

Watkin David was to be allowed three pounds the firſt year towards making a fallow of one of the cloſes ſo let to him by Thomas Evans; *but this agreement was not reduced into writing, but made in the preſence of ſeveral witneſſes now living, and who will teſtify the ſame.*

Morgan Thomas, clerk, the mortgagee, about a year and a half paſt after the letting the ſaid cloſes by the ſaid Thomas Evans to the ſaid Watkin David, ſerved the ſeveral tenants of the eſtate with declarations in ejectment; and at the then following great ſeſſions held for Glamorganſhire, obtained judgment therein; and by virtue of his majeſty's writ of *habere facias poſſeſſionem* the ſeveral tenants attorned to him, and have ſince paid him their reſpective rents.

The ſaid Morgan Thomas, after thus getting into poſſeſſion of the eſtate, employed one William Auſtin to let out the ſame, and to receive the rents from the tenants; which he has accordingly done, and has diſcounted the ſaid allowance of three pounds to Watkin David, as agreed by

Thomas Evans, in manner following, *viz.* "June the "29th, 1753, then received of Watkin David, in caſh, "three pounds and ten ſhillings, with three pounds al- "lowed him for burning lime to the Marlepit (one of the "cloſes abovementioned to be let to him), which amount- "ed to the ſum of ſix pounds and ten ſhillings, in full of "his year's rent due at Lady-day laſt O. S. paſt, for the "year 1752: I ſay, received to the uſe of the reverend "mr. Morgan Thomas, by me,

"WILL. AUSTIN."

On the 17th day of November laſt, the ſaid Watkin David was ſerved by the ſaid William Auſtin with a notice in the words following, *viz.* "I William Auſtin, be- "ing lawfully authoriſed by the reverend mr. Morgan "Thomas, your landlord, do, by virtue of an act of par- "liament made in the fourth year of the reign of his pre- "ſent majeſty, hereby demand of you, and give you no- "tice to deliver him poſſeſſion of the lands lying in the "pariſh of Newton Nottage, in the county of Glamorgan, "which you hold under him, at Lady-day O. S. next en- "ſuing the date hereof, being the day after the determi- "nation of your term therein; and if you afterwards will "hold over and keep him out of poſſeſſion of the ſaid lands, "you ſhall, during the time you ſhall ſo hold over the ſame, "pay him at the rate of double the yearly value of the "ſaid lands for ſo long a time as the ſame are detained by "you, to be recovered in any of his majeſty's courts of "record by action of debt, whereto you ſhall be obliged "to give ſpecial bail. Dated the 17th day of Nov. 1753.

"To WATKIN DAVID. WILL. AUSTIN, Agent."

The ſaid Watkin David, notwithſtanding the above notice, hath ſtill kept poſſeſſion of the lands above demanded, as he imagines his agreement with Thomas Evans is binding for three years againſt the mortgagee, though he has attorned tenant to him. The ſaid Watkin David likewiſe imagines that the above notice was not delivered in due time, as it was not ſerved ſix months before the expiration of the year, if the mortgagee could law aſide the ſaid agreement.

The ſaid Watkin David has lately been ſerved with a *quo minus* at the ſuit of the mortgagee, which he imagines is for the double rent, as he has paid the ſaid William Auſtin his year's rent due at Lady-day laſt.

The

The ſaid Watkin David did not make a fallow of the ſaid cloſe for which the above allowance was made him for burning lime by the ſaid William Auſtin, but did lime and manure it to a greater amount than the three pounds allowed; for which reaſon it is inſiſted, on the part of the mortgagee, that his agreement with Thomas Evans was forfeited.

Whether upon the ſtate of this Caſe the mortgagee had a right to demand the lands from Watkin David at the time above required, and whether the notice was delivered in due time? If ſo, What is the method Watkin David muſt now purſue, as he has held over the ſame? Quære.

BY the act for prevention of frauds and perjuries 29 Car. 2. ch. 3. all leaſes, eſtates, terms of years, or any uncertain intereſt of, in, or out of any meſſuages, &c. made or created by parole only, and not put into writing and ſigned by the parties ſo making or creating the ſame, or their agents thereunto lawfully authoriſed by writing, ſhall have the force and effect of leaſes at will only, and ſhall not be deemed or taken, either in law or equity, to have any other or greater force or effect; except, nevertheleſs, all leaſes not exceeding the term of *three* years from the making, whereupon the rent reſerved ſhall amount to two-thirds of the full improved value. As the leaſe in queſtion was made for ſeven years, and not put into writing and ſigned as the act requires, by the purview of the act it can have no force or effect but as a leaſe at will; and the ſame is not within the exception, which ſpeaks only of leaſes for three years ſo qualified as the act ſpeaks: for the intent of the act never was to make good a leaſe for ſeven years, or any greater term, and qualified as to the exception for three years, part of the term; but ſuch leaſe, if not within the benefit of the exception, is void for the whole term, and not good for part of the term and void for the other. And as to the act of 4 Geo. 2. for the more effectual preventing frauds committed by tenants, I think that the Caſe in queſtion Anſwer.

does not come within the conſideration of this laſt act; for it enacts, "That in caſe any tenant or tenants for "any term for life, *lives, or years*, or other perſon or per-"ſons who are or ſhall come into poſſeſſion of any lands, "&c. by, from, or under, or by colluſion with *ſuch* tenant "or tenants, ſhall wilfully hold over any lands, &c. after "the *determination of ſuch term or terms*, and after, &c." Now as this leaſe for ſeven years by 29 Cha. 2. has no greater force or effect in law or equity than a leaſe at will, this ſtat. of 4 Geo. 2. ſeems not to extend to ſuch tenants who never had any fixed or certain term or intereſt, and who might be turned out every day, but to tenants for life or years only; which was the great miſchief before the making this laſt act, and conſequently intended to be remedied thereby. Note the words, "after the deter-"mination of ſuch term or terms:" the word *ſuch* binds the purview up to the leaſes beforementioned for life or years; and the words "after the determination of ſuch "term or terms" do not ſeem to enlarge the ſenſe of the words; for a tenancy at will cannot, in a legal ſenſe, be properly ſaid to be determined, at leaſt by effluxion of time, as leaſes for lives and years are. But the leaſe in queſtion for ſeven years ſeems to be abſolutely void at firſt; and in caſe Thomas Evans, the uncle of the infant, had brought an action againſt Watkin David, his leſſee; if Watkin David had pleaded *nil habuit in tenementis*, he muſt in his replication have ſhewed (but he could not) that he had an eſtate ſufficient to produce that leaſe.

I do not obſerve that the act of 4 Geo. 2. gives directions to ſerve the notice for delivering poſſeſſion up in ſix months, or any other time; and therefore if a tenant for life or years holds over after the determination of the term, and after notice, then he is to pay during the time he holds over as in the act. If the plaintiff declares for double rent, and his caſe is not within the act, and he declares on the act, I think he muſt be nonſuit.

The

The three pounds to be allowed to W. David is for fallow: but though he does other things on the land to a greater amount, I think that will not be allowed him. I think, if the mortgagee brings an ejectment he will recover, but not upon the act of 4 Geo. 2.

Lincoln's-Inn, June 4, 1754. THEOD. JOHNSON.

CASE 2. On leaſe by *P.* to *D.* and ſale thereof to *M.* without aſſignment—Whether receiving the rent of *M.* is admitting him tenant? and, Whether cutting and lopping to improve the copyhold eſtate be a forfeiture of the leaſe?—with Mr. MELMOTH'S OPINION.

RICHARD PLUMMER, eſq. by indenture of leaſe dated 20th Dec. 1721, let to dame lady Dolliffe a houſe ſituate at Mitcham, in the county of Surrey, with the barns, gardens, &c. thereunto belonging, and twenty-eight acres of paſture, to hold unto the ſaid lady Dolliffe, her executors, adminiſtrators, and aſſigns, for the term of twenty-one years, under a certain rent payable quarterly; in which is a covenant on the part of the leſſee, that ſhe, her executors, adminiſtrators, and aſſigns, ſhould not, during the ſaid term, let or aſſign the ſaid premiſes to any perſon whatſoever without the licence of the leſſor, his heirs or aſſigns; and ſhould not nor would fell, cut down, or carry away any pollard trees, nor lop, top, or ſtrip any timber trees, or likely to prove timber trees, during the ſaid term; and will ſurrender and yield up all the things mentioned in the ſaid ſchedule thereunto annexed, and all the ſaid fruit and other trees now or then growing on the ſaid premiſes; and would not remove, tranſplant, or carry away any of the ſaid trees off the premiſes.—*Vide* Leaſe.

The ſaid lady Dolliffe, for a valuable conſideration, ſold ſaid leaſe to mr. Mendes without any licence from or by conſent of ſaid mr. Plummer, and promiſed to aſſign over the ſame to mr. Mendes; and lady Dolliffe delivered over her ſaid leaſe to mr. Mendes, but the ſame has not been yet aſſigned. Mr. Mendes, on purchaſing ſame, entered on ſaid premiſes; upon which mr. Plummer came to mr. Mendes, and deſired he would pay the rent to him; and accordingly mr. Mendes has, ever ſince he had the ſame, from time to time paid his rent to mr. Plummer, and never to lady Dolliffe.

Mr. Mendes, to enlarge the gardens, has took in one of the fields, in which ſtood two oak trees, which he has cut

cut down, and has lopped and topped ſeveral oaks and elms to beautify the walks, and for no other purpoſe; and by what mr. Mendes has laid out and done, he has very much improved the eſtate.

Mr. Mendes has given great additions in ever-greens, fruit-trees, ſtatues, and other ornaments, (beſides what is mentioned in the leaſe), which mr. Mendes will have a right to take away at the expiration of the ſaid term; but it is feared that aſſignment of ſaid leaſe from ſaid lady Dolliffe to mr. Mendes will bear date after what mr. Mendes has done as aforeſaid. And as the ſame will ſo appear by the date of the aſſignment at the expiration of the ſaid leaſes, which may create diſputes between the leſſor and mr. Mendes, therefore to ſettle the draft of the aſſignment, ſo as mr. Mendes may take away all he has done;

N. B. The whole is copyhold.

1. Quære. Whether mr. Plummer by the receiving his rent of mr. Mendes has not admitted him his tenant as aſſignee of ſaid leaſe, and thereby waived the aforeſaid covenant from lady Dolliffe, that ſhe would not let or aſſign the premiſes without his conſent?

Anſwer. I APPREHEND, that mr. Plummer, by admitting mr. Mendes to be his tenant, and receiving his rent from him, has ſo far waived this covenant, that if he ſhould bring an action againſt ſaid lady Dolliffe for breach thereof, I think equity will relieve, and enjoin him from proceeding.

But though mr. Plummer has accepted mr. Mendes for his tenant, yet I do not think that the covenant is thereby wholly waived; but that mr. Mendes, as aſſignee, will be bound by it, and cannot without leave from mr. Plummer aſſign the leaſe or let the premiſes to another tenant.

2. Quære. Whether mr. Mendes' taking in ſaid field and cutting down ſaid two oaks to enlarge his gardens, and lopping and topping ſaid trees to beautify the walks, is a forfeiture of his leaſe, when what he has laid out and done has greatly improved the ſame? or, Whether mr. Plummer can only recover what the trees were worth, which might be about 10l. and which mr. Mendes, if required, is ready to pay?

MR.

MR. MENDES, by turning paſture land into garden ground, and cutting down timber trees, has committed waſte; which I apprehend to be a forfeiture of his leaſe, of which the lord of the manor, but not mr. Plummer, may take advantage, and enter for the forfeiture: and mr. Plummer may likewiſe bring an action of waſte, and recover treble damages. Anſwer.

Whether the lord of the manor can take any advantage of mr. Plummer or mr. Mendes for what mr. Mendes has done? and, What may he recover? 3. Quare.

THIS is anſwered before. Anſwer.

If it ſhould be againſt, Whether equity will relieve? 4. Quære.

THE court of equity has denied to relieve a copyholder againſt a forfeiture for voluntary waſte; and I do not know any Caſe where relief has been granted againſt ſuch a forfeiture: however, in the preſent Caſe, the premiſes being ſo conſiderably improved and made more valuable by what mr. Mendes has done, I am inclined to think, that if the lord ſhould take advantage of the forfeiture, mr. Mendes would be relieved in equity. Anſwer.

And for the ſame reaſon I apprehend, mr. Mendes would be relieved againſt mr. Plummer, if he ſhould bring an action of waſte; and for this further reaſon, which I take to be a very material circumſtance in the preſent Caſe, that mr. Plummer (as I underſtand) as been treating with mr. Mendes about ſelling him the eſtate, and has inſiſted on an extraordinary price by reaſon of the improvements made by mr. Mendes.

Oct. 7, 1725. W. MELMOTH.

JOHN

CASE 3. Aug. 24, 1702. A teſtator deviſes freehold hereditaments in *H.* to one for life; remainder to truſtees to preſerve, &c. remainder to the firſt and other ſons of tenant for life; with remainders over in ſtrict ſettlement. Teſtator alſo deviſes lands which he held by leaſe for twenty years renewable every ſeven years, unto his wife for ſo much of his eſtate therein as ſhe ſhould live; and after her death he deviſes the ſame unto the reſpective perſon and perſons to whom his ſaid lands in *H.* ſhould from time to time come and deſcend—The ſeveral OPINIONS of Mr. FILMER, and Sir DUDLEY RYDER, Whether the leaſehold lands were abſolutely alienable by the firſt tenant for life?

JOHN FOTHERLEY being ſeiſed of certain lands, &c. in the county of Hertford in fee ſimple, and poſſeſſed of certain other lands held by leaſe of Caius College in Cambridge for twenty years, renewable by ſaid College every ſeven years upon payment of a certain fine, by his laſt will and teſtament deviſes the ſaid lands in Hertfordſhire to *Dorothy his wife* for life, and for a year after; remainder to Darnelley Wooden and Warburton for ninety-nine years for payment of his debts, annuities, and legacies in his will or codicil to be contained; remainder to *Temple Whitfeld* for ninety-nine years, if he ſo long live; remainder to truſtees and their heirs to preſerve contingent remainders; remainder to the firſt, ſecond, and every other ſon of the ſaid Temple Whitfeld in tail male; and for default of ſuch iſſue, remainder to *Henry Whitfeld brother of the ſaid Temple*, for ninety-nine years, if he ſo long live; remainder to *Henry Whitfeld (eldeſt ſon by a ſecond venter of ſaid Henry) for ninety-nine years, if he ſo long live*; remainder to truſtees and their heirs to preſerve contingent remainders; remainder to the firſt and every other ſon of the ſaid Henry Whitfeld the ſon in tail male; remainder to Henry Williamſon for ninety-nine years, if he ſo long live; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of the ſaid Henry Williamſon in tail male; remainder to the right heirs of ſir Ralph Whitfeld.

Then by his ſaid will, reciting, that he held the ſaid other lands by leaſe from Caius College for twenty years, or ſome other term, he gives and deviſes the ſaid leaſehold lands, and all his eſtate and intereſt therein, *unto his ſaid wife for ſo long of the ſaid term of twenty years*, or other eſtate, as the teſtator then had in the ſaid leaſehold lands, *as his ſaid wife ſhould happen to live*; and his will was, that if either at the time of his death or afterwards, during the life of his wife, there ſhould be ſeven years expired of the term which was or ſhould be granted to him by the ſaid College of the ſaid leaſehold premiſes, that then his ſaid wife, her executors, adminiſtrators, or aſſigns, ſhould at their own coſts and charges renew the ſaid leaſe at the end of every ſeven years from the time of making the ſaid leaſe, which ſhould expire either at his death or during the life-time of his ſaid wife; *and after the death of his ſaid wife*, he gives and deviſes his ſaid leaſe from the ſaid College,

and

and his leaſehold lands, and all his eſtate and intereſt therein, *unto the reſpective perſon and perſons to whom his ſaid lands in Hertfordſhire* ſhould from time to time, by virtue of his ſaid will, *come and deſcend*, from and after the deceaſe of his ſaid wife, to attend the freehold reverſion and inheritance thereof. And his will was, that the reſpective perſon and perſons to whom the ſaid lands in Hertfordſhire, after the death of his ſaid wife, by virtue of his ſaid will ſhould come and deſcend, when they ſhould be in actual poſſeſſion thereof, ſhould at his and their proper coſts and charges, at the end of every ſeven years from the making and granting the ſaid leaſe from the ſaid College, renew the ſame with the ſaid College for the term of twenty years from the making and granting of every ſuch reſpective leaſe.

The teſtator ſhortly after dies, and Dorothy, his widow and executrix, proves ſaid will.

The ſaid Dorothy makes *her* will, and gives and be- 10 Oct. 1707.
queaths the ſaid leaſehold lands to the ſaid Temple Whitfeld and William Wankford, in truſt to pay her debts and funeral charges, and to pay ſome legacies therein ſpecified.

She alſo gives to the ſaid Temple Whitfeld, after the expiration of one year, her leaſe of the ſaid leaſehold lands on this ſpecial truſt, that the ſaid leaſe be from time to time renewed by him, and go along with the inheritance of the ſaid lands in Hertfordſhire to ſuch perſon and perſons to whom the ſame are in her ſaid huſband's will limited, given, and appointed.

The ſaid Dorothy dies.

The ſaid Temple Whitfeld entered on all the ſaid eſtates, and continued in poſſeſſion many years, but never had and iſſue male; and ſeveral times, whilſt he was in poſſeſſion of the ſaid eſtates, out of his proper eſtate renewed the ſaid leaſe from the ſaid College in his own name, and paid ſeveral great and conſiderable ſums of money as a fine or fines for ſuch renewals.

The ſaid Temple Whitfeld afterwards, and during the reſpective lives both of the ſaid Henry Whitfeld the father and Henry Whitfeld the ſon, apprehending that the ſaid leaſehold eſtate was not liable to be intailed, and that he had a right and power to diſpoſe of ſaid leaſehold lands to whom he ſhould think proper, did accordingly by his *laſt will and teſtament in writing*, dated the *7th day of Nov.* 1718, give and deviſe the ſaid leaſehold lands, and all his

eſtate

eſtate and intereſt in the ſame, and right of renewal, *to his nephew Ralph Whitfeld*, his executors, adminiſtrators, and aſſigns; and of his ſaid will appointed the ſaid Ralph Whitfeld ſole executor.

Afterwards, *viz. in* 1730, *the ſaid Temple Whitfeld died* (the ſaid Henry Whitfeld the father and Henry Whitfeld his ſon being both living); and the ſaid Ralph Whitfeld, by virtue of the ſaid will of him the ſaid Temple Whitfeld became poſſeſſed of the ſaid leaſehold lands, and accordingly entered into poſſeſſion thereof; and the ſaid Henry Whitfeld and his ſaid ſon Henry, by his conſent, and under ſome agreement between them, entered upon the ſaid freehold eſtate. And afterwards the ſaid *Henry Whitfeld the father*, to whom the ſaid freehold lands in Hertfordſhire next deſcended by virtue of the aforeſaid will of the ſaid John Fotherley (the ſaid Henry Whitfeld the ſon being ſtill living), by *indenture of aſſignment, dated* 30*th May* 1732, *made between the ſaid Henry Whitfeld the father* of the one part, and the ſaid *Ralph Whitfeld, his eldeſt ſon and heir apparent*, reciting the will of John Fotherley, and that by virtue of the ſaid ſeveral limitations therein concerning the ſaid leaſehold premiſes of the manors of Croxley and Snelſhall *cum pertinentiis*, ſome doubts had ariſen, and might ariſe, concerning the validity of ſuch limitations, and divers diſputes and ſuits in law or equity might ariſe concerning the ſame, and concerning the right, title, and intereſt thereof, and to whom the ſame ought to appertain; and reciting that ſaid Ralph Whitfeld, though he was the eldeſt ſon and heir apparent of ſaid Henry Whitfeld, party thereto, yet ſaid Ralph Whitfeld had not hitherto had or received any advancement from ſaid Henry Whitfeld his father, but had been educated, maintained, and aſſiſted by ſaid Temple Whitfeld, at his ſole charge, from ſaid Ralph Whitfeld's infancy to the day of the death of ſaid Temple F. Whitfeld, and to him the ſaid Temple F. Whitfeld ſolely, and to his bounty and munificence, and to no other perſon whatſoever, owed both his maintenance and ſubſiſtence for himſelf and family for ſeveral years then laſt paſt, and all that he then held and enjoyed, both in real and perſonal eſtate; in contemplation whereof, and to the intent and purpoſe that all diſputes and differences which had or might ariſe by or between the ſaid Henry and the ſaid Ralph of or concerning the right, title, truſt, and intereſt of ſaid leaſehold premiſes held of ſaid College might be utterly prevented and extinguiſhed; and

and to the end that the ſaid Ralph Whitfeld might peaceably and quietly have, hold, poſſeſs, and enjoy, all and ſingular the ſaid recited leaſehold premiſes, and receive and take the rents, iſſues, and profits thereof, without the let, ſuit, trouble, or interruption, of or by the ſaid Henry Whitfeld, his executors or adminiſtrators, or any claiming by, from, or under him; and alſo for and in conſideration of the natural love and affection which the ſaid Henry Whitfeld, party thereto, had and ought to bear to ſaid Ralph Whitfeld, his eldeſt ſon and heir apparent; and alſo for and in conſideration of the ſum of 100l. of lawful money of Great Britain, to him the ſaid *Henry Fotherley Whitfeld* duly paid (and acknowledged by a receipt indorſed on the back of the ſaid indenture); and alſo for divers other good cauſes and conſiderations him the ſaid Henry thereto eſpecially moving, he the ſaid Henry F. Whitfeld did grant, bargain, ſell, tranſfer, aſſign, and let over unto the ſaid Ralph Whitfeld, his executors, adminiſtrators, and aſſigns, for ever, all the ſaid leaſehold premiſes, and alſo all his the ſaid Henry F. Whitfeld's right of and in the ſame, and the rents, iſſues, and profits thereof, without giving any account therefore to the ſaid Henry F. Whitfeld, his executors and adminiſtrators, either in law or equity, for or in reſpect of the ſame; and the ſaid Henry F. Whitfeld, for the conſiderations aforeſaid, did, as far as in him lay, allow, ratify, and confirm the eſtate of the ſaid Ralph Whitfeld of and in all and ſingular the ſaid leaſehold premiſes therein-before mentioned, and of and in every part and parcel thereof; and for the conſiderations aforeſaid did remiſe, releaſe, and for ever quit claim unto the ſaid Ralph Whitfeld all his the ſaid Henry F. Whitfeld's right, title, intereſt, property, claim, or demand, either in law or equity, or otherwiſe howſoever, of, in, or to the ſame, *to hold the ſame to the ſaid Ralph Whitfeld*, his executors, adminiſtrators, and aſſigns, for ever, to his and their own proper uſe and behoof, and to and for no other uſe, truſt, intent, or purpoſe whatſoever; with an uſual covenant for further aſſurances.

Accordingly the ſaid *Ralph Whitfeld continued in poſſeſſion of the ſaid leaſehold premiſes all the reſt of the life-time of the ſaid Henry Whitfeld the father, and for as many years afterwards* of the life-time of the ſaid Henry Whitfeld the ſon as he himſelf lived; and did ſeveral times, during ſuch his poſſeſſion, renew the ſaid leaſe in his own name.

And afterwards the ſaid Ralph Whitfeld, in the life-time of the ſaid Henry Whitfeld the ſon, did, by his laſt will and

and teſtament, dated 27th day of October 1741, give and deviſe the ſaid leaſehold premiſes to Thomas Whitfeld his ſon, and of his ſaid will appointed the ſaid Thomas Whitfeld ſole executor: but he having no debts owing to him, nor being indebted to any, *the ſaid Thomas Whitfeld has not hitherto thought proper to prove the ſame*; but the ſaid Ralph left no perſonal aſſets.

And afterwards, *viz.* in 1743, the ſaid Ralph Whitfeld died (the ſaid Henry Whitfeld the ſon being then living); and the ſaid Thomas Whitfeld, by virtue of the ſaid will of the ſaid Ralph Whitfeld, became poſſeſſed of the ſaid leaſehold lands; and accordingly entered into the poſſeſſion thereof, and ſo continued during the reſt of the life-time of the ſaid Henry Whitfeld the ſon, unmoleſted by the ſaid Henry Whitfeld the ſon, and ſtill continues in poſſeſſion thereof; and has, during ſuch his poſſeſſion, twice *renewed* the ſaid leaſe in his own name.

The ſaid Henry Whitfeld the ſon dies, leaving iſſue Henry Whitfeld, his eldeſt ſon and heir, who has attained his full age of twenty-one years about half-a-year ago; and both he and his father, by ſome agreement between Henry the grandfather and ſon, have been reſpectively in the quiet poſſeſſion and enjoyment of the real eſtate ever ſince the death of the ſaid Temple Whitfeld, who died in 1730; and the ſaid Ralph Whitfeld and the ſaid Thomas Whitfeld have been in the quiet poſſeſſion of all the leaſehold premiſes ever ſince the death of the ſaid Temple Whitfeld.

1. Quere. Whether is the deviſe of the ſaid leaſehold made by the ſaid Temple Whitfeld to the ſaid Ralph good in point of law or equity, as Temple, who had no further eſtate than for ninety-nine years in the freehold, had never any iſſue male, and as Henry the father, who aſſigned to Ralph, had only a life-eſtate for ninety-nine years in the freehold reſpectively? and if the deviſe of Temple be not good, Whether the length of time incurred ſince his death, moſt of which incurred during the life of Henry the ſon, who had a like eſtate of ninety-nine years alſo in the freehold, will bar the right of Henry the grandſon in equity, either by equity of the ſtatute of limitations, or the apparent notice which they reſpectively had of their title?

Anſwer. I AM of opinion, Temple Whitfeld's deviſe, and Henry his brother's aſſignment of this leaſehold eſtate to mr. Ralph

Ralph Whitfeld, were both good to paſs their reſpective titles and intereſts in the leaſe; but I conceive, ſuch deviſe and aſſignment did not bar the executory deviſes over, neither to Henry the ſon nor Henry the grandſon; neither will the length of time, I think, bar the grandſon, ſuppoſing it to be a good executory deviſe.

Secondly, As the College could not be compelled to renew, and as there never was or could be any leaſe ſubſiſting for more than twenty-one years at one time;

Whether the teſtator had power to create a truſt of ſuch a term to continue longer than for lives then in being, which were Temple, Henry the father, and Henry the ſon? and, Whether a court of equity will carry into execution ſuch a deviſe of a term not already in being, but to be done ſo by perpetual renewings, which the College could not be compelled to make? 2. Quære.

EXECUTORY deviſes and truſts of terms have been held good, that were to take effect in twenty-one years after lives in being; and in this caſe, Temple Whitfeld dying without iſſue male, the deviſe to Henry the grandſon takes place within the compaſs of lives in being; and, according to the Caſe of Stanley and Leigh, in 2 P. Wms. I think it will be good, and that a court of equity will carry it into execution. Anſwer.

Thirdly, If the court will decree Thomas Whitfeld to make an aſſignment of the leaſe, and to come to an account, from what time ſhall the account be taken? and, What allowance ſhall be made for fines and renewal to the College? 3. Quære.

I THINK, as the late Henry Whitfeld the ſon commenced no proſecution againſt mr. Ralph Whitfeld to recover this leaſehold eſtate, if the court ſhould decree mr. Thomas Whitfeld to aſſign the leaſe to Henry his grandſon, that he will not be obliged to account for the rents and profits but from the death of Henry Whitfeld the ſon, Anſwer.

and

and that he will have allowance made for the fines he has paid for renewals ſince the death of Henry the ſon.

Aug. 11, 1753. BEV. FILMER.

1. Quære. Whether the deviſe of the ſaid leaſehold made by the ſaid Temple Whitfeld to the ſaid Ralph be good in point of law or equity, as Temple, who had no further eſtate than for ninety-nine years in the freehold, had never any iſſue male, and as Henry the father, who aſſigned to Ralph, had only a life-eſtate for ninety-nine years in the freehold reſpectively? and if the deviſe of Temple be not good, Whether the length of time incurred ſince his death, moſt of which incurred during the life of Henry the ſon, who had a like eſtate of ninety-nine years alſo in the freehold, will bar the right of Henry the grandſon in equity, either by equity of the ſtatute of limitations, or the apparent notice which they reſpectively had of their title?

Anſwer. AS Temple Whitfeld renewed, and ſo had the legal eſtate abſolutely, his will might be good in point of law. But I conceive, it was not good in equity, which binds the renewed leaſes, to the uſes or truſts of the will of John Fotherley, ſo far as ſuch limitations tending to a perpetuity are allowed to extend. And as Henry the father and ſon were both in being at the time of his will, I think, the limitation over to the grandſon was good, and conſequently Ralph had no right in equity after the death of Henry the ſon; nor will either the ſtatute of limitations or the notice mentioned bar the right of Henry the grandſon.

As the College could not be compelled to renew, and as there never was or could be any leaſe ſubſiſting for more than twenty-one years at one time;

2. Quære. Whether the teſtator had power to create a truſt of ſuch a term to continue longer than for lives then in being, which were Temple, Henry the father, and Henry the ſon? and, Whether a court of equity will carry into execution ſuch a deviſe of a term not already in being, but to be done ſo by perpetual renewings, which the College could not be compelled to make?

I THINK,

I THINK, the ſhortneſs of the term makes no difference. That ſort of tenant's right of renewal is affected by the will; and equity will decree the renewed terms to go juſt as far as it would if the original term was over ſo long, and ſtill continued. In both caſes, it will not ſuffer the limitations to run into a perpetuity; and therefore the preſent Henry the grandſon has the abſolute property, and may diſpoſe of the term as he pleaſes. Anſwer.

If the court will decree Thomas Whitfeld to make an aſſignment of the leaſe, and to come to an account, from what time ſhall the account be taken? and, What allowance ſhall be made for fines and renewal to the College? 3. Quære.

I THINK, it will decree him to aſſign the leaſe and account for the profits from the death of Henry Whitfeld the ſon; and probably without any allowance for the fines, as he was ſuffered to enjoy it to that time. Anſwer.

Thomas Whitfeld, the ſon and executor of Ralph Whitfeld, has ſearched amongſt his father's deeds and writings for leaſes of the eſtate in queſtion granted by the College to any and what perſons; but upon ſuch ſearch *he cannot find any leaſe made to the ſaid John Fotherley*, and but one to mrs. Fotherley his widow, which is dated 8th July 1707, to hold from Michaelmas 1706 for twenty years.

He finds alſo, that the ſaid Temple Whitfeld renewed again at Michaelmas 1712; and again at Michaelmas 1719; and again at Michaelmas 1727; which was the laſt of his renewals, and at which time the twenty years granted to mrs. Fotherley his widow expired; ſo that it appears, that the ſaid Temple Whitfeld outlived all the terms which were granted either to mr. Fotherley or his wife; which naturally leads the *Quæriſt* to the following *Quære, viz.*

Admitting that Fotherley might have deviſed a term, or, which is the ſame, the truſt of a term of which he was actually poſſeſſed, for a long term of years to Temple Whitfeld the father and Henry Whitfeld his ſon, in the manner as he has deviſed in the preſent caſe; and admitting that ſuch reſpective limitation of ſuch terms, or truſts

of

of a term or terms, would be good executory deviſes to the ſaid Temple Henry Whitfeld and Henry his ſon, yet as all the Caſes in the Books, at leaſt as appears to the *Querift*, are of deviſes of ſuch terms, or the truſts of ſuch terms of years then actually in being, and over which terms the teſtator had power, and not of terms of twenty-one years, or other term renewable at the will of the leſſees, and which leſſees could not be compelled to grant or renew after the expiration of the then leaſe;

4. Quære. Whether this will not make a material difference in the Caſe? and, Whether a court of equity ever has or will decree ſuch renewed terms to be carried into execution upon the terms of the will, or conſider ſuch terms ſo renewed as truſts or otherwiſe, and falling in with the rules of a long term, of which the teſtator had power and was in poſſeſſion of at the time of his will?

Anſwer. IF John Fotherley had really no term nor truſt of a term, I am of opinion, his deviſe of it was void; and conſequently the whole foundation of the claim of Thomas Whitfeld fails. But if John Fotherley had ſuch term or truſt of a term, I think, the renewals ſtand on the ſame foot as the original term, and are to be governed by the ſame rules.

Aug. 27, 1753. D. RYDER.

LEASE.

Case 4. Leaſeholdlands are conveyed in truſt to pay the profits to *B.* for his life, and after his deceaſe to aſſign the lands to the wife of *B.* for the remainder of the term.—The Opinion of Mr. Booth, Whether *B.* and his wife can together diſpoſe of theſe lands?—*Vide* 1 Eq. Ca. Ab. 58.

LEASEHOLD LANDS, by a voluntary ſettlement, were veſted by *B.* in a truſtee for the remainder of the term, in truſt to pay the profits to *B.* for life, and after his deceaſe to aſſign to the wife of *B.* for remainder of the term.

Can *B.* and his wife make a good title? and, Can ſhe by fine or decree bind her intereſt ſo as a purchaſer may be ſafe in caſe ſhe ſurvives *B.*? and, Will it be good againſt *B.*'s creditors? Quære.

I CONCEIVE, a good title may be made by *B.* and his wife, upon *B.*'s wife having a decree againſt her to bind her intereſt, or joining with her huſband in a fine *ſur conceſſit* for the whole reſidue of the term, or within a few months or ſmall time of ſuch reſidue. The fine *ſur conceſſit* muſt be for years, rendering a pepper-corn rent. I apprehend, that where a feme covert is *ceſtui que* truſt of a term, or of any other chattel intereſt in land, ſhe may, by appearing in the court of chancery, and conſenting to a decree, or by joining with her huſband in a fine *ſur conceſſit* for the years which are to come under the term, bar herſelf, even though the huſband previous to the marriage or ſubſequent thereto (with and for good conſiderations) conſented to or created the truſt; for in other caſes the huſband is entitled to the truſt of the wife's term for years, as he is to the terms themſelves, and may alone, without the wife, diſpoſe thereof. Anſwer.

April, 1755. JAS. BOOTH.

CASE 5.

July 8, 1743. A teſtator ſeiſed of lands held under a freehold leaſe for three lives, deviſed all his freehold and copyhold hereditaments to truſtees and their heirs, to the uſe of the heirs of the body of the teſtator; remainder to the uſe of *M. B.* in tail male; remainder over. The teſtator died without iſſue. Two of the lives afterwards dying, *M. B.* ſurrenders the leaſe, and upon payment of a fine, obtains a grant of a new one to her heirs and aſſigns, and then dies without iſſue. —Mr. BOOTH's OPINION, Whether the ſurrender of the old and acceptance of the new leaſe by *M. B.* was a complete bar of the limitation made to her in the nature of an eſtate tail by the teſtator's will?

ON this day the reverend Blayney Baldwyn, died, poſſeſſed of a leaſehold eſtate, called Biſhop's Meadow, otherwiſe Wye Meadow, held under the biſhop of Hereford for three lives, *viz.* one Powell, Joſeph Gulſton, ſon of William Gulſton, eſq. and the ſaid Blayney Baldwyn. The ſaid Powell died in the life-time of the ſaid Blayney Baldwyn.

July 17, 1741. The ſaid Blayney Baldwyn made his will in writing, legally atteſted; and after deviſing an annuity of 200l. a-year to his wife for life, payable out of and charged on all his real and perſonal eſtate, deviſed his manors, and all his freehold and cuſtomary or copyhold meſſuages, lands, tenements and hereditaments whatſoever and whereſoever (except as therein is excepted), to the reverend William Adams and Thomas Higgins, and their heirs, to the uſe of the heirs of the body of him the ſaid Blayney Baldwyn begotten or to be begotten; and for default of ſuch iſſue, to the uſe of his ſiſter Mary Baldwyn, and the heirs male of her body; remainder to the uſe and behoof of Arthur Blayney, eſq. and the heirs male of his body; with remainder over; taking no notice of the above-mentioned leaſehold eſtate *(pur auter vie)* unleſs the ſame ſhall be deemed to be a freehold eſtate, and paſs as ſuch under the above deviſe of freehold: gives divers pecuniary and ſpecific legacies: and, laſtly, as to all the reſt and reſidue of his goods, chattels, ready money, money on ſecurities, and all other his perſonal eſtate, of what nature or kind ſoever, ſubject to the payment of all the legacies and his debts and funeral expences, he gives the ſame to his ſaid ſiſter Mary Baldwyn; and appoints her ſole executrix of his will, who proved the ſame in the common form in the Arches court of Canterbury.

The ſaid Blayney Baldwyn died without iſſue, and the ſaid Mary Baldwyn (who was alſo heir at law to her ſaid brother) entered on the eſtates limited as aforeſaid to her, and alſo on the ſaid leaſehold eſtate under the biſhop of Hereford:

Hereford: the former ſhe enjoyed for her life: as to the latter, two of the lives were dead, *viz.* the ſaid Powell and mr. Blayney Baldwyn, and the ſaid Joſeph Gulſton's life only remaining in being.

The ſaid Mary Baldwyn ſurrendered the ſaid leaſe ſubſiſting for the life of the ſaid Joſeph Gulſton to the preſent biſhop of Hereford, who thereupon, and for a valuable conſideration (being about 135l.), granted a new leaſe to her, her heir and aſſign, of the ſame premiſes, for the lives of the ſaid Joſeph Gulſton, the ſaid Mary Baldwyn, and Arthur Blayney, eſq. and the longeſt liver of them, at the rent of 24l. *per annum*, payable half yearly. May 24, 1745.

The ſaid Joſeph Gulſton, the ſurviving life in the old leaſe, and one of the lives for which the renewed leaſe was granted, departed this life. Dec. 13, 1757.

The ſaid Mary Baldwyn died without iſſue, having firſt made her will in writing, dated Auguſt 17, 1757, wherein ſhe takes no notice of the ſaid leaſe of the Biſhop's Meadow, or her eſtate therein ſubſiſting for the life of the ſaid Arthur Blayney, eſq. but gives and bequeaths all the reſt, reſidue and remainder of her perſonal eſtate, goods, chattels, and effects whatſoever, ſubject to the payment of her debts, legacies and annuities therein given, funeral charges, and the charges and expences of proving her will, unto her couſin Mary Powys, to be paid, aſſigned and delivered over to her, at her age of twenty-one years, by her executors, Henry Powys, eſq. and Edward Eliſha, gentleman, therein named and appointed, who have proved the ſaid will in common form in the Arches court of Canterbury. Sept. 30, 1748.

Pleaſe to obſerve, that the intereſt in the leaſehold premiſes for the ſubſiſting life was purchaſed by mrs. Baldwyn, and did not come to her by virtue of her brother's will.

The ſtatutes of 29 Cha. II. againſt frauds, and that of the 14 Geo. II. are in the words following, and relate to eſtates *pur auter vie*.

" And for the amendment of the law in the particulars " following, Be it further enacted by the authority afore- " ſaid, That from henceforth any eſtate *pur auter vie* ſhall " be deviſeable in writing, ſigned by the party ſo deviſing " the ſame, or by ſome other perſon in his preſence, and " by his expreſs directions, atteſted and ſubſcribed in the " preſence of the deviſor by three or more witneſſes; " and if no ſuch deviſe thereof be made, the ſame ſhall be 29 Car. II. c. 2. ſ. 12.

" chargeable in the hands of the heir, if it ſhall come to " him by reaſon of ſpecial occupancy, as aſſets by deſcent, " as in caſe of lands in fee ſimple: and in caſe there ſhall " be no ſpecial occupant thereof, it ſhall go to the execu- " tors or adminiſtrators of the party that had the eſtate " thereof by virtue of the grant, and ſhall be aſſets in " their hands."

14 Geo. II. " And whereas by an act made in the 29th year of the " reign of king Charles II. entitled, 'an act for preven- " tion of frauds and perjuries,' amongſt other things it is " enacted, That eſtates *pur auter vie* whereof no deviſe " ſhould be made, ſhould, in caſe there ſhould be no ſpe- " cial occupant thereof, go to the executors or adminiſtra- " tors of the party that had the eſtate thereof by virtue of " the grant, and ſhould be aſſets in their hands: And " whereas doubts have ariſen, where no deviſe has been " made of ſuch eſtates, to whom the ſurplus of ſuch eſtates, " after the debts of ſuch deceaſed owners thereof are fully " paid and ſatisfied, ſhall belong: Be it enacted by the " authority aforeſaid, That ſuch eſtate *pur auter vie*, in " caſe there ſhall be no ſpecial occupant thereof, of which " no deviſe ſhall have been made according to the ſaid " act for prevention of frauds and perjuries, or ſo much " thereof as ſhall not have been deviſed, ſhall go, be ap- " plied, and diſtributed in the ſame manner as the per- " ſonal eſtate of the teſtator or inteſtate."

There are ſome Caſes in 3 Wms. on this head.

1. Quære. As this Caſe is circumſtanced, To whom does the right and intereſt of the ſaid leaſe belong for the life of the ſaid Arthur Blayney, eſq.? Does it belong to him as deviſee in tail male, as freehold under the will of mr. Blayney Baldwyn? or, Do the ſaid leaſe-hold premiſes belong to the executor of mrs. Mary Baldwyn (who are alſo perſonal repreſentatives of mr. Blayney Baldwyn) as an eſtate *pur auter vie* undeviſed? or, Is or are the heir or heirs at law of the ſaid mrs. Baldwyn entitled thereto in their own right, or in truſt for the executors of mrs. Baldwyn, to be applied as aſſets, and diſtributed in the ſame manner as the perſonal eſtate of the ſaid Mary Baldwyn? or Where does the ſame veſt?

Note, The biſhop's leaſe to mr. Blayney Baldwyn is not to be had at preſent; but it is preſumed the grant is to him, his heirs and aſſigns, as is ſtated in his ſiſter's leaſe.

2. Quære. If you are of opinion that the leaſe paſſes to mr. Blayney by the will of mr. Baldwyn, Will he be obliged to repay to the executors the whole of his life, being the third

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in the leaſe, or the whole ſum paid by mrs. Mary Baldwyn upon her ſurrender and renewal?

IN anſwer to the Firſt *Quære*, I am clearly of opinion, that the leaſehold lands here mentioned, as the ſame were held for an eſtate of freehold, paſſed by the will of mr. Blayney Baldwyn; for he expreſsly mentions his freehold and copyhold lands whatſoever and whereſoever. Anſwer to Firſt Quære.

To the Second I anſwer, That as mr. Blayney Baldwyn died without iſſue, the deviſe to the heirs of his body could not take place; but the deviſe to the uſe of his ſiſter Mary Baldwyn, and the heirs male of her body, remainder to the uſe of Arthur Blayney, eſq. and the heirs male of his body, with remainders, or rather limitations, over, was good; and under that deviſe mrs. Mary Baldwyn was in nature of tenant in tail male: I ſay in nature of tenant in tail male; becauſe a real eſtate tail, within the ſtatute *de donis*, can only be created of lands of inheritance; whereas, here the lands deviſed were only freeholds deſcendible: ſo, as to a remainder after a limitation to an heir of the body, there can be no ſuch really, under the ſtatute *de donis*, but of lands of inheritance; for freeholds deſcendible are not capable thereof. For this reaſon no recovery can be ſuffered to bar theſe limitations to ſpecial heirs of the body, and to remainder men of theſe freeholds deſcendible; becauſe in every common recovery the fee is demanded and recovered; and it would be a forfeiture to the leſſor for the leſſee, or his aſſigns, to take on him to alienate or meddle with the fee. But as theſe intereſts, which are in nature of eſtates tail, are admitted on theſe freeholds deſcendible, and it would make them unalienable if ſome method was not allowed of to bar the *quaſi* intail, and the limitations over, as effectually as recoveries are allowed of to bar real eſtates tail and remainders within the ſtatute *de donis*; the courſe has been, to allow thoſe who were the Anſwer to Second Quære.

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See Hardolph Wadſley's Caſe, tempt. Ann. Reg.—the Duke of Grafton's Caſe about 1718—Norton's Caſe about 1739, 1740.

quaſi tenants in tail (not thoſe who had barely life-intereſts) to bar theſe intails, and the limitations over, by any ſort of conveyance or alienation, ſuch as bargain and ſale, a leaſe and releaſe, &c. juſt as they thought fit: and after ſuch a ſolemnity the heirs of intail and *quaſi* remainder men (who really claim under limitations or ſubſtitutions that only amount to deſignations of ſpecial occupancies) have been deemed to be utterly excluded, as much as the iſſue and remainder men are deemed to be upon the ſuffering of a common recovery.

Then the queſtion will be, Whether mrs. Mary Baldwyn has here executed any ſuch ſolemn alienation, diſpoſition or conveyance, as ought to bar and deſtroy that courſe of ſucceſſion, in nature of an intail, that has been eſtabliſhed by her brother's will? I confeſs, I at firſt conſidered the ſurrender and renewal more as an indication of her intention to continue and prolong the intereſt ſhe took under her brother's will, than as a deſign to bar and exclude her iſſue male and mr. Arthur Blayney, and the others claiming under the farther ſubſtitutions in that will; and the many Caſes that are to be met with of renewals being conſidered in the hands of truſtees, mortgagees, guardians and agents, as continuations of the right of the former owners, fortified me at firſt in this opinion. But the Caſe of Maſon and Day, in Precedents in Chan. 319. and in other Books, and the conſideration that this muſt be firſt examined, as it ſtands in point of law, and that there is no way of letting in the heir male of mrs. Baldwyn (if any ſuch there was) or mr. Blayney, without the aid of equity, to make mrs. Baldwyn's heir-general a truſtee for them, have made me alter my opinion. In the Caſe of Maſon and Day, a freehold deſcendible, held under an archbiſhop's leaſe, was purchaſed by *M.* a feme ſole, who married, and had iſſue a daughter, and then ſurrendered the old leaſe, and took a new one to her and her heirs, during two freſh lives and an old one, and then died, and

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it deſcended to the daughter, and ſhe died inteſtate; and having no iſſue, there was a conteſt between the heir *ex parte paternâ* of *M.* and the heir *ex parte maternâ*. It was inſiſted, if there had been no renewal, it muſt have gone to the heir on the part of the mother, and the new leaſe was but a continuation of the old right. But the Court held, the new leaſe was a new acquiſition, and *M.* the mother took it as a purchaſer; and therefore it ſhould go to the heirs on the part of the father of *M.* the renewal by the archbiſhop being gratuitous and ſpontaneous, and he not being compellable thereto.

Wherefore, as here the ſurrender by mrs. Baldwyn was a complete diſpoſition, I think that will ſufficiently bar the intereſt ſhe had in nature of a tenancy in tail, and all other the ſubſtitutions in her brother's will. But it would have been otherwiſe if ſhe had had but a life intereſt; and I apprehend that the renewed leaſe has veſted a good title in mrs. Baldwyn's heir at law, he being ſpecial occupant in this caſe, and there being no deviſe thereof in the will of mrs. Baldwyn.

Lincoln's Inn,
Auguſt 15, 1761. JA. BOOTH.

LEGACY.

LEGACY.

Case 1. Whether a legacy given to a perſon towhom the teſtator was indebted in *auter droit* is a ſatisfaction of a debt?

E. B. made his laſt will and teſtament, and named and appointed his niece *S. B.* ſole executrix and reſiduary legatee of the ſame; and by a codicil annexed to the ſaid will the teſtator gave the ſaid *S. B.* 50l. in truſt to be applied to the maintenance and education of *J. M.* his grandſon, to place him out apprentice at a proper age, but to be at the diſcretion and ſole management of his ſaid niece, and as ſhe ſhould think fit.

The ſaid *S. B.* after the death of the ſaid *E. B.* duly proved his ſaid will, and poſſeſſed herſelf of aſſets much more than ſufficient to pay all his juſt debts and legacies, and in her life-time paid, in part of the ſaid legacy, 20l. to place the ſaid *J. M.* out an apprentice; ſo there remained due from the ſaid *S. B.* at the time of her death 30l. the remainder of the ſaid legacy.

The ſaid *S. B.* made her laſt will, and gave to the ſaid *J. M.* 50l.

Quære. Whether the ſaid legacy of 50l. given to the ſaid *J. M.* by the ſaid *S. B.* is to be conſidered as a ſatisfaction for the 30l. due from her to the ſaid *J. M.* being the reſidue of the legacy left him by the will of *E. B.*? or, Whether he is entitled to both the ſaid ſums of 30l. and 50l.?

Anſwer. IF a debtor gives a legacy to his creditor greater or equal to his debt, generally ſpeaking (*Vide* P. Wms. 3.) it will be looked upon as a ſatisfaction of the debt. This ſeems to be grounded upon a rule in the civil law: "*Debitor non præſumitur donare.*" But it ſeems to be a hard rule; for where a man has aſſets ſufficient to pay and to give, it is hard that he may not be preſumed to give to his creditor who has lent him money as well as to any other perſon; therefore the courts of equity hold the rule very ſtrictly; and as this is a debt due from mrs. *B. in auter droit*, if ſhe has made no executor, or ſuch executor has renounced,

renounced, then I think, that an adminiſtration *de bonis non, &c.* muſt be granted to mr. *B.* and adminiſtration muſt be granted to mrs. *B.* and then the 30l. will be due from his adminiſtrator *de bonis non, &c.* and the 50l. from her adminiſtrator; ſo that the debt will be due from one, and the legacy from the other; and then it would ſeem that the legacy cannot be preſumed as a ſatisfaction of the debt, though it is poſſible that both one and the other may come out of the aſſets of mrs. *B.*: and ſhould this be the caſe, I ſhould think that the legacy would not be a ſatisfaction of the debt. But as mrs. *B.* was the executrix and reſiduary legatee of mr. *B.* if ſhe poſſeſſed his aſſets, which were ſufficient to pay his debts and legacies with an overplus; if ſhe gave this 50l. and made an executor, ſuch executor would be executor to mr. *B.* and then ſuch executor would be a debtor to her in both the ſums, unleſs the 50l. ſhould be conſtrued to be a ſatisfaction of the 30l. being more than the debt, which I think would be upon the principle mentioned above.

June 1, 1761. R. WILBRAHAM.

MR. C. YORKE gave it as his opinion, that the legacy was plainly in that caſe a ſatisfaction of the 30l.

MR. EL. HARVEY thought, that as the two legacies are diſtinct demands, and the firſt legacy given in truſt, that mrs. *B.*'s executor was liable to the 30l. as well as the 50l.; and that the firſt legacy, not being a debt due from mrs. *B.* in her own right, but only a claim upon her as a truſtee of mr. *B.* cannot be ſuppoſed to come within the rule of extinguiſhing a debt by giving a legacy that exceeds it.

Case 2. Whether one of the teſtator's children, being a baſtard *eigne*, is entitled to take by her father's will of land deviſed to the teſtator's two daughters?

A. Deviſed all his real eſtate to his two daughters, *B. W. C.* and *D. W. E.* for the termof their lives; and after the deceaſe of the ſurvivors of them, to and amongſt all and every the children, whether ſons or daughters, of his ſaid two daughters that ſhould be then living, equally between them and their heirs and aſſigns for ever, to hold as tenants in common, and not as joint-tenants; and deviſes all the reſt and reſidue of his real and perſonal eſtate to his two daughters, equally to be divided between them.

Some time after making the ſaid will, the teſtator purchaſed a conſiderable real eſtate, and died ſeiſed thereof without altering his will. The ſaid two daughters and their huſbands have received and divided the perſonal eſtate, and the ſaid *B.* and *C.* his wife are deſirous to have a partition made of the real eſtate.

C. W. B. was born before the marriage of the teſtator, and *E. W. D.* within a lawful time afterwards. They were both by the ſame woman.

1. Quære. Is it neceſſary to prove the ſaid *C.* a baſtard *eigne* before any proceedings had by way of partition?

Anſwer. NOT neceſſary, becauſe a writ of partition may be brought immediately by virtue of the ſtatute 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 2.

2 Quære. Is the ſaid *C.* entitled to take by virtue of the ſaid deviſe?

Anſwer. *AS C. was the reputed daughter* of the teſtator, ſhe was entitled to take by virtue of the ſaid deviſe, *viz.* a moiety of the freehold the teſtator was poſſeſſed of at the time of his making the ſaid will, and a moiety of the perſonal eſtate the teſtator died ſeiſed of; and her children will have a right to take in equal proportion with her ſiſter's children.

3 Quære. Will the real eſtate purchaſed by the teſtator ſince making his ſaid will paſs by any deviſe therein? if not, Is not the ſaid *E.* entitled to the whole *as a mulier puiſne?*

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THE eſtate purchaſed *afterwards does not paſs by the ſaid will*; and if *E.* can make out the baſtardy of *C.* her ſiſter, ſhe will be entitled to the whole, and may maintain an ejectment for it. Anſwer.

The ſaid *D.* had iſſue born alive by the ſaid *E.* his wife in the life-time of the ſaid teſtator, but none ſince his death: Whether, upon the death of his wife, he is intitled to hold by curteſy, ſhould the ſaid *C.* ſurvive or not ſurvive her? 4. Quære.

D. is entitled to be tenant by curteſy of the premiſes purchaſed by the teſtator ſince the making of the ſaid will, though he had no child ſince the teſtator's death; and if *C.* ſhould die in his wife's life-time without leaving any child, and his wife ſhould likewiſe die without iſſue, then he may be tenant by curteſy of his wife's moiety of the ſaid premiſes particularly deviſed: and if there are any other freeholds not ſpecifically deviſed, *but yet paſs by the reſiduary clauſe*, he will be entitled to be tenant by curteſy of his wife's moiety. To ſecure that point, *E.* his wife may ſettle the premiſes not deviſed by will as ſhe pleaſes; *and likewiſe one moiety of any freehold eſtate that paſſes by the reſiduary clauſe*, and one moiety of the reſt of the freehold eſtate; which may take place in caſe both ſhe and her reputed ſiſter ſhould die without children. Anſwer.

Middle Temple,
31ſt April, 1751. JOHN FORD.

LIMITATIONS.

LIMITATIONS.

CASE 1.
A teſtator deviſes to one for the life of teſtator's ſiſter, upon condition of paying her 30l. annuity out of the ſame, with a power of entry upon default of payment; and after her deceaſe, to the iſſue of the body of the ſaid ſiſter, both male and female, equally, and their heirs in common; remainder over. Tenant for life, after teſtator's death, makes default, and the ſiſter and her huſband enter, and afterwards the tenant for life releaſes to them.—Mr. FAZAKERLEY's OPINION upon the operation of a fine or recovery, if levied or ſuffered by the releaſees.

ROBERT BIRCH by will gives certain lands and tenements to Luke Taylor for the term of the natural life of Ann Birch his ſiſter, upon condition to pay her 30l. annuity out of the ſame; with a power of entry to her on default; and after her deceaſe, then to the iſſue of the body of the ſaid Anne, both male and female, equally, and their heirs in common; with a remainder over in fee; as *vide* the clauſe annexed. The ſaid Anne is lately married to one William Row, and the ſaid Taylor not paying the annuity, her huſband and ſhe entered, and got poſſeſſion of the ſaid premiſes; and being ſo poſſeſſed, the ſaid Taylor by deed-poll releaſed to the ſaid Row and Anne his wife, and his, her and their heirs, all the ſaid premiſes, and all the eſtate right, title and intereſt of him therein or thereto which he claimed under the will aforeſaid, otherwiſe howſoever, with a covenant for further aſſurance, &c. as counſel ſhould adviſe. And note, that Anne has no iſſue, but is *enceinte*.

Quære.

As the ſaid Row and Anne had poſſeſſion of premiſes, and Taylor ſo releaſing afterwards as above all his eſtate, &c. to Row and Anne his wife; Is not Anne by ſuch releaſe entitled unto the premiſes for the term of her natural life? and if ſo, then the eſtate of the premiſes being by the will, after her deceaſe, limited to her iſſue as above, Has not Anne thereby an eſtate tail, ſo as with her huſband to bar her iſſue, and the ſaid remainder over, by fine or recovery, or both? and, Is it beſt to do it before ſhe has iſſue living? or, May it be done afterwards?

Anſwer.

I AM of opinion, that Anne Birch took no eſtate in the premiſes, but only an annuity of 30l. *per annum*, with a power to enter for ſatisfaction of arrears; and the limitation

tation to the iſſue of her body and their heirs did not create an eſtate tail, but the ſame was a contingent remainder in fee to all her iſſue, male and female, as tenants in common; with a conditional limitation over, in caſe ſhe ſhould have no iſſue. This being the caſe upon the will, although the releaſe from Taylor to Row and his wife, then in poſſeſſion, will carry his intereſt to them, yet it will not turn her intereſt into an eſtate tail; and therefore, although by a fine or recovery they may before iſſue born bar the contingent remainder to living iſſue, yet it will not bar the contingent limitation over. From hence you ſee the danger of attempting to bar the iſſue, without any advantage to themſelves.

2d March 1744. N. FAZAKERLEY.

CASE 2.

An eſtate is limited to *A.*'s appointment; and in default of and until ſuch appointment, to *A.* for life; and in caſe *E.* the wife of *A.* ſhould ſurvive him, to *B.* during the life of *A.* in truſt for *A.* his heirs and aſſigns; and after the deceaſe of the ſurvivor of *A.* and his wife, to the heirs and aſſigns of *A.*—The ſeveral OPINIONS of Mr. MARRIOTT, Mr. WILBRAHAM, Mr. BOOTH, and Mr. FILMER, Whether the limitation to *B.* is veſted or contingent?

LANDS were limited to ſuch perſons for ſuch eſtates as *A.* by deed or will ſhould appoint; and in default of and until ſuch appointment, to the ſaid *A.* for life; and in caſe *E.* the wife of the ſaid *A.* ſurvives him, then to *B.* and his heirs during the life of the wife, in truſt and for the benefit of *A.* his heirs and aſſigns, and to prevent dower; and after the death of the ſurvivor of *A.* and his wife, remainder to the heirs and aſſigns of the ſaid *A.* for ever.

A. being about to ſell the eſtate, Whether *B.* is a neceſſary party to join in the conveyance with *A.* to the purchaſer? (that is) Whether *B.* has *ab initio* a veſted or contingent remainder? Quære.

THE conveyance is by way of uſe executed in *A.* for life, with power to diſpoſe of the fee. No eſtate or intereſt can veſt in *B.* till the contingency ſhould happen Mr. MARRIOTT'S OPINION.

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of *A.*'s dying without making an appointment; and as this very conveyance to the purchaſer (when made as from *A.* alone) is an appointment, after it is executed, that contingency can never happen. *B.* having therefore no eſtate or intereſt in the premiſes, either in law or equity, at preſent, nor any poſſibility of having any after *A.* ſhall have made ſuch conveyance, I conceive he is not a neceſſary party to join in the conveyance with *A.* to a purchaſer.

Nov. 11, 1748. HU. MARRIOTT.

Mr. WILBRAHAM'S OPINION. I THINK, that as the power is a plain ſimple power, and is by the conveyance to the purchaſer fully executed, that *B.* can have no intereſt; and therefore it is not neceſſary to make him a party.

Nov. 21, 1748. R. WILBRAHAM.

Mr. BOOTH'S OPINION. IF the uſes had been to *A.* for life, then to ſuch perſons and for ſuch eſtates as he ſhould appoint, and then the words had been, "*in default* of ſuch appointment to *B.* during the life of the wife," or for any other greater eſtate, I conceive it is plain from Leonard Lovie's Caſe, 10 Co. 78. and Sir Edward Clere's Caſe, 6 Co. 68. the uſe to *B.* would have been contingent, and the fee might be then in abeyance, nobody being appointed to take the fee or remainder but on the contingency of *A.*'s making no appointment. But in the preſent caſe the uſes are, in the firſt inſtance, to ſuch perſons and for ſuch eſtates as *A.* ſhall by deed or will appoint; and then the words are, *and in default of and until ſuch appointment*, &c. to the uſe of *A.* for life; and in caſe his wife ſurvives him then after *A.*'s death to *B.* and his heirs during the life of the wife; remainder over in fee. Here the uſes to *A.* and *B.* cannot be contingent: firſt, Becauſe then the freehold would be

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in abeyance, which the law will not allow: ſecondly, Becauſe the deed expreſsly veſts the freehold and inheritance in the reſpective takers immediately by expreſs limitation; for the words are *until ſuch appointment ſhall be made to the uſe of*, &c.; ſo that in the interim the uſe veſts in *A.* and the remainder over, until he makes an appointment, having an opening for the interpoſition of the uſes which are to ariſe under any appointment by *A.* in virtue of his power, whenever that ſhall be, as in Lewis Bowles's Caſe, 11 Co.

And this Caſe is the ſame as if the uſes had been expreſſed thus:—Until *A.* ſhall make an appointment, in virtue of his power after mentioned, to *A.* for life, remainder to *B.* and his heirs *pur auter vie*, the remainder or reverſion to *A.* in fee; provided that after *A.* ſhall make an appointment by deed or will, the releaſees ſhall ſtand to the uſe of ſuch perſons and for ſuch eſtates as *A.* ſhall in ſuch deed limit or appoint.—And this is the caſe of every marriage-ſettlement—"Until the marriage to *J. S.* in fee, "and after to uſes for the benefit of the huſband and wife, "and their iſſue." It is ſaid, that notwithſtanding this reaſoning may be right with reſpect to the eſtates limited to *A.* which may be a veſted uſe, yet that it cannot be ſo with reſpect to *B.* whoſe eſtate is limited upon a contingency, *viz.* if *C.* ſurvive her huſband. I anſwer, that theſe words cannot make *B.*'s eſtate contingent, ſince this contingency muſt be neceſſarily implied, if you give him an immediate veſted remainder during the wife's life; and if this were not ſo, every remainder man for life, after an eſtate previouſly limited to another for life, would take by way of contingent remainder.

It only remains for me to ſay, that all I have ſaid tends to ſhew there is an actual eſtate and intereſt veſted in *B.* as well as in *A.* and that therefore *B.* is a neceſſary party to join in the conveyance to the purchaſer.

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And although it be true, that if *A.*'s power remains entire, untouched, unextinguiſhed, or unſuſpended, then the uſe may well enough ariſe to the purchaſer; yet I may venture to affirm, I never ſaw a deed ſettled with good advice but what not only contained an appointment in virtue of the power, but alſo a grant by way of conveying the eſtate and intereſt of the vendor, and all claiming under or in truſt for him. And if this were not ſo, many of the moſt operative words and clauſes would be left out in all conveyances.

March 18, 1748. JA. BOOTH.

Mr. Marriott, counſel for the vendor, and Mr. Booth, counſel for the purchaſer, ſtill differing in opinion, they agreed to be determined by Mr. Filmer, who gave the following Opinion.

Mr. FILMER'S OPINION.

THE limitation to *B.* and his heirs during the wife's life being to prevent her title to dower, I apprehend, that *B.* is only a truſtee for *A.* the huſband, and that the wife has no intereſt. If ſo, then if the purchaſer requires *A.* not only to limit and appoint the eſtate by virtue of his power, but alſo to convey the remainder or reverſion in fee (which I think is reaſonable he ſhould do, leſt he may have done any act to extinguiſh his power), I ſee no inconvenience can happen to *B.* if he ſhould join in the conveyance by the direction of *A.* if the purchaſer requires him ſo to do: though I cannot ſay *B.*'s joining will much mend the title, becauſe *B.*'s remainder ſeems to be a contingent remainder, and not veſted; and conſequently he has no eſtate in him to convey.

BEV. FILMER.

Upon further conſideration of this Caſe I am inclined to think, that notwithſtanding the contingent words the remainder

remainder to *B.* is a veſted remainder, becauſe the contingency muſt happen upon the determination of the particular eſtate on the death of *A.*; and therefore, for the reaſons before mentioned, I think *B.* ſhould join in the conveyance with *A.*

10*th April*, 1749. BEV. FILMER.

N. B. *B.* did join accordingly.

Vide 1 Lev. 11. 2 Saund. 380. Salk. 224. 3 Rep. 20. 10 Rep. 85. Carthew, 203. 1 Inſt. 43. a.

CASE 3.

A B. upon his marriage conveys lands, which he held under a freehold leaſe for lives, in truſt for himſelf for life, and afterwards for his wife for life; and then upon diver truſts for the benefit of the iſſue of the marriage, and ſubject thereto, "upon truſt to "convey the "ſame to ſuch "perſon or perſons as ſhall be heir or heirs of *A. B.* and his, her and their heirs and aſſigns."—There being no iſſue of the marriage, the ſeveral OPINIONS of Mr. WILBRAHAM, Mr. YORKE and Mr. BOOTH, Whether the terms of the ultimate truſt would be deemed words of limitation or of purchaſe?

BY a ſettlement previous to the marriage of mr. Freelove, a freehold leaſe of an eſtate held under the biſhop of Wincheſter for three lives, was veſted in truſtees, in *truſt*

For mr. Freelove to take the rents for life; then

For his wife to take the rents for her life; then

Upon divers truſts for the benefit of their children, and ſubject thereto; then

That the ſaid truſtees ſhould convey and aſſure the ſaid leaſehold premiſes, and all their eſtate and intereſt of and in the ſame, *to ſuch perſon or perſons as ſhall be heir or heirs of mr. Freelove and his, her and their heirs and aſſigns*; and to, for or upon no other truſt, intent or purpoſe whatſoever.

The marriage has been had about twenty-five years, and there has been no iſſue of ſuch marriage, nor is there any expectancy of iſſue.

Will the words *marked above by the Italic characters* be deemed words of limitation ſo as to enable mr. Freelove to diſpoſe of the reverſion of the eſtate by deed or will, in caſe of no iſſue? or, Will they be deemed words of purchaſe, and thereby occaſion the eſtate to deſcend to ſuch perſon as ſhall be the heir or heirs of mr. Freelove, how-

Quære.

ever he, ſhe or they be, at the death of him and his wife, without iſſue?

Mr. WILBRAHAM's OPINION.

I THINK, that the words *in Italics* will not be deemed words of limitation, ſo as to give mr. Freelove a power to diſpoſe of the reverſion of the eſtate by deed or will in caſe he has no iſſue: but the words, I think, will be deemed words of purchaſe; for the word *heirs* is not always and of neceſſity to be intended as a word of limitation; and as the eſtate is veſted in truſtees, it will, I think, remain in them till it be ſeen who ſhall be the heir of mr. Freelove; and then the truſtees are to convey to ſuch perſon as ſhall anſwer that deſcription, and to his heirs; for there being words of limitation added to the word *heir* or *heirs* will, I think, make the firſt words *heir* or *heirs* words of purchaſe; and the truſtees will be obliged to convey to ſuch perſon who ſhall be his heir at his and his wife's death without iſſue, and not to his grantee.

Lincoln's Inn, R. WILBRAHAM.
June 5, 1764.

Mr. YORKE's OPINION.

I AM of opinion, that mr. Freelove may by deed or will diſpoſe of the intereſt in this freehold leaſe, after the death of the wife and failing children of his marriage, in like manner as any owner of a freehold leaſe limited to himſelf and his heirs; in which caſe, though the heir may take as a ſpecial occupant in caſe no diſpoſition be made to the contrary, yet the leſſee whoſe heirs are deſcribed has the abſolute property and may diſpoſe of the leaſe. The ſtatute of frauds 29 Car. II. c. 3. ſ. 12. has enabled ſuch leſſees to deviſe their eſtates held *pur auter vie*; and I think, that the ſuperadding words of limitation to the words *ſuch perſon or perſons as ſhall be heir or heirs* of mr. Freelove, will make no difficulty in this caſe. They are ſuperfluous words.

June 4, 1764. C. YORKE.

THIS

This Caſe would bear a good deal to be ſaid upon it, but I think it is needleſs. There are many Caſes in the Books that the words *ſuch perſon or perſons* as ſhall be heir or heirs of *F.* are to be taken as words of purchaſe, eſpecially when they have words of limitation grafted upon them, as here there are by the words—"and his, her and "their heirs and aſſigns." All the Caſes agree, that ſuch words as are here uſed in the firſt part, amount to a *deſcriptio perſonæ* or *perſonarum*, and give no right to the original taker, or veſt any reverſionary eſtate or intereſt whatſoever in him, but are words of purchaſe applicable to the perſon who is the heir. Mr. Booth's Opinion.

Had this been a ſettlement of lands held for an abſolute eſtate of inheritance, the limitation, upon which the queſtion ariſes, would have amounted to a contingent remainder, and then the tenant for life might, by feoffment or fine, have deſtroyed it by the deſtruction of the particular eſtate, the fee being in abeyance: but the premiſes here are held by a leaſe for lives, and the claimants can have no more than a freehold deſcendible: therefore, here there can be no fee in abeyance, and conſequently here is no contingent remainder capable of being deſtroyed. This limitation amounts only to a deſcription of a ſpecial occupancy, which no act of mr. Freelove can ſet aſide. This point I remember was agreed upon a Caſe that came before ſir Dudley Ryder, mr. Filmer, and myſelf; and we all held, that upon freeholds deſcendible held *pur auter vie*, all the limitations amounted to deſignations of ſpecial occupancy, and that then there could be no contingent remainders whatſoever; and ſo I think in the preſent caſe.

I ſuppoſe this was a ſettlement made by the father or mother, or ſome other relation, of mr. Freelove on his marriage, and that they took this method, in default of iſſue of the marriage, to ſecure this eſtate to his brothers or ſiſters and their iſſue. I mention this, becauſe, if mr. Freelove was himſelf the only grantor, theſe limitations

might be conſidered as not within the compaſs of the marriage agreement, and ſo voluntary and fraudulent againſt purchaſers: but in this there are great niceties.

Lincoln's Inn, JA. BOOTH.
July 5, 1764.

Caſe 4.

By leaſe and releaſe certain hereditaments are conveyed to the uſe of *H. I.* and his wife for their lives, and the life of the ſurvivor of them; remainder to the uſe of the *iſſue* of their two bodies; remainder to the uſe of the wife in fee.—The Opinion of Mr. Booth,

BY indentures of leaſe and releaſe, bearing date reſpectively the 17th and 18th days of April 1703, Thomas Wiſe, gentleman, deceaſed, did grant unto John Wiſe and Edmund Riſdale, gentlemen, and their heirs, a meſſuage and lands at Burton Leonard, with the appurtenances to hold *to the uſe and behoof of Henry Iveſon and Alicia his wife, for and during their natural lives, and the life of the longer liver of them; and from and after their deaths, to the uſe and behoof of the iſſue of their two bodies between them lawfully begotten or to be begotten; and for default of ſuch iſſue, to the right heirs of the ſaid Alicia for ever.*

Henry Iveſon and Alicia his wife had iſſue one ſon only, who died in his mother's life-time, having iſſue many children.

What eſtates the huſband and wife, and their children reſpectively, took under theſe limitations.

Quære. What eſtate did Alicia Iveſon and her only ſon reſpectively take under the above ſettlement?

Anſwer. The word *iſſue* in a will is a word of limitation, and has the ſame effect and operation, and is deemed to be almoſt of the ſame import as the words *heirs of the body*; but in a deed no eſtate of inheritance can paſs but by proper technical words of limitation, which are the words, *his* or *her heirs*, or *his* or *her right heirs*, or *the heirs of the body*: theſe words are abſolutely neceſſary, or at leaſt ſome of them; and the word iſſue will not do. See 1. Roll. Abr. 837. Nevil and Nevel. Co. Lit 206. 2, Inſt 334. Co. Lit. 28. a. Brownlow, 152. 2 Lord Raym. fo. 1440. Comyn's Reports, 457. 561. Makepeace and Fletcher.

But

But the word *iſſue* in a deed is a word of purchaſe, and has a proper ſignification of its own: it is equivalent in its import to the word *child* or *children*, and gives to that child or thoſe children an eſtate for life: therefore, by the indentures of leaſe and releaſe of the 17th and 18th of April 1703, here ſtated, Henry Iveſon and Alicia his wife were joint tenants for life, with remainder to their only ſon for his life, with remainder to Alicia in fee: and as the caſe has happened, that this only ſon of Henry and Alicia died in his mother's life-time, I think, when ſhe ſurvived her huſband, her eſtate for life and her reverſion in fee, became conſolidated, and thereby the eſtate for life merged, and became extinguiſhed in the inheritance: and ſo Alicia (if ſhe was *ſui juris*) could by deed or will ſettle, deviſe, or diſpoſe of the lands as ſhe pleaſed; otherwiſe thoſe lands would deſcend to her heir at law.

Lincoln's-Inn, JA. BOOTH.
July 15, 1766.

CASE 5.

A. B. by deed-poll in conſideration of natural love and affection, gives, grants, bargains, and ſells, unto his eldeſt ſon, a large tract of uncultivated land in Jamaica, to hold to his ſaid ſon for life;

A Being ſeiſed of a large tract of uncultivated land in the iſland of Jamaica, and having four ſons and two daughters, by deed-poll (being then in Great Britain), in conſideration of the natural love and affection which he had and bore for his eldeſt ſon *B.* then alſo in Great Britain, but going to reſide at Jamaica, and for and towards making a competent proviſion and future maintenance for him, did freely and abſolutely give, grant, bargain, and ſell, unto the ſaid *B.* all thoſe 600 acres of land laid out for him the ſaid *B.* deſcribed in the plot thereto annexed, bounding as therein mentioned, being part of the ſaid large tract of uncultivated land, to hold the ſaid lands thereby

remainder "to the child or children of the ſaid *B.* lawfully begotten and to be begotten; "and for want of ſuch," to the heirs and aſſigns of *A. B. A. B.* afterwards, by his will, deviſes his reverſion to *C.* and dies. The eldeſt ſon, upon the death of *A. B.* executes ſuch deeds concerning the lands compriſed in the ſettlement, as, by the laws of Jamaica, have the effect of a fine and recovery.—The OPINION of Mr. BOOTH, In what manner the deed poll operated, what eſtates the eldeſt ſon and his children took thereby, and what was the effect of the deeds executed by the ſon.

given,

given, or intended ſo to be, *unto the ſaid B. and his aſſigns, during the term of his natural life; and after his deceaſe, then to the child or children of the ſaid B. lawfully begotten and to be begotten; and for want of ſuch,* to the heirs and aſſigns of the ſaid *A.* for ever; ſubject to this proviſo, that if the ſaid *B.* ſhould be minded or deſirous to ſell and diſpoſe of the ſaid lands thereby given to him, he ſhould firſt give the preference and offer in writing to the ſaid *A.* his heirs, executors, and adminiſtrators, before he ſhould make ſuch ſale and diſpoſal: and on non-complying therewith, ſuch lands ſhould go to and be enjoyed by ſuch perſon or perſons as the ſaid *A.* ſhould by deed or will appoint; and for want of ſuch appointment, ſhould go to and be enjoyed by his the ſaid *B.*'s brothers or heirs at law; and that that gift or grant ſhould be deemed and taken in full ſatisfaction and lieu of any right, claim, or demand, or pretended right, claim, or demand, on account of any ſettlement, writing, or writings, will, or other pretence whatſoever.

Immediately after the execution of the ſaid deed-poll, *B.* went to Jamaica, and entered into poſſeſſion of the lands granted him by ſaid deed-poll, and ſettled a valuable ſugar-work thereon. *B.* ſoon after his arrival in Jamaica intermarried there, and had iſſue ſeveral children, ſome born in the life time of *A.* the father, and ſome after his deceaſe.

Aug. 17, 1753. *A.* died in the year 1754, and by his laſt will and teſtament of this date, duly executed, gave to his ſon *B.* 1000l. Jamaica currency, and made proviſion for two of his younger ſons, and for his two daughters; and gave, deviſed, and bequeathed to his other younger ſon *C.* certain valuable plantations and lands in Jamaica, therein particularly mentioned, and amongſt others, that tract of uncultivated land which he then poſſeſſed: And as to all the reſt of his eſtate or eſtates, both real and perſonal, of what nature or kind ſoever that he ſhould be poſſeſſed of, intereſted in, or entitled unto at his death, and not therein or any otherwiſe given or diſpoſed by him, the ſaid teſtator by his ſaid will gave, deviſed, and bequeathed to his ſaid ſon *C.*; and all thereſt therein mentioned to the ſaid *C.* was to him and the heirs of his body lawfully begotten: but if his ſaid ſon *C.* ſhould die without ſuch heirs, then the ſaid teſtator's will was, that all his eſtates, of what nature or kind ſoever, be equally divided between his ſaid three ſons (*B.* being one of them) and two daughters, and their heirs for ever.

B. after the death of *A.* executed deeds concerning ſaid lands compriſed in ſaid deed-poll, which according to the laws of Jamaica have the force of a fine and recovery; and afterwards about the year 1758, *B.* having then a wife, and by her four children, *viz.* one ſon and three daughters, executed a deed of ſettlement of ſaid lands, thereby raiſing a term for ſecuring an annuity to *B.* and his wife, and the ſurvivor during the term; and the reſidue of the rents and profits during the term to be applied towards the payment of the juſt debts of *B.*; and ſubject to ſaid term to the uſe of *B.* for life: and as to the other moiety and alſo the firſt mentioned moiety after the deceaſe of *B.*'s wife, to the uſe of all and every the child or children of the ſaid *B.* by his ſaid then wife, and their heirs and aſſigns for ever, as tenants in common.

B. died in 1767, leaving his ſaid wife, his ſon *D.* and three daughters. *C* is ſtill living, and the fortune left him by his ſaid father *A.* was very valuable; but *D.* had nothing from *A.* but ſaid lands, and the legacy of 1000l.; the former he improved by ſettling a ſugar-work thereon, as above mentioned. *D.* the ſon of *B.* is the youngeſt of his children.

What eſtate did *B.* take under the ſaid deed-poll from *A.* in the lands thereby granted? Was any, and what eſtate remaining in *A.* in ſaid lands, after the execution of ſaid deed-poll? If ſo, Did ſuch eſtate paſs by his ſaid will to his ſon *C.*? or, Did the ſame go to *B.* as the eldeſt ſon and heir at law of *A.*? 1. Quære.

The deed-poll here muſt, as I think, operate as a covenant to ſtand ſeiſed. There is no other way for it to operate. The intent certainly was to give *B.* an eſtate tail in the 600 acres. The unſkilfulneſs of the perſon who had the penning of that deed, has fruſtrated that intent. In a deed, no eſtate of inheritance will paſs from the grantor, ſave under the word *heir* or *heirs of the body.* Here the limitation in the *habendum* is to *B.* and his aſſigns, during the term of his natural life; and after his deceaſe, unto the children of the ſaid *B.* lawfully begotten and to be begotten; and for want of ſuch, to the heirs and aſſigns of the ſaid *A.* (the grantor) for ever. Anſwer.

If

If this is a covenant to ſtand ſeiſed, as I clearly think it is, according to the Caſe of Croſſing and Scudamore, Vent. 137. then the conſideration of love, &c. will extend to *B.*'s children, they being the grandchildren of *A.*; ſo that after *A.*'s expreſs eſtate for life all the children of *A.* ſons and daughters, will take as joint-tenants; but there being no words of limitation to give them an eſtate of inheritance, they can only take as joint-tenants for their lives and the life of the ſurvivor. The further limitation to the right heirs of *A.* the grantor, I take either to be void; and ſo it will operate the ſame as if it had not been inſerted at all, or elſe there will be a reſulting uſe to *A.* during his life by implication; and that conjoining with the limitation to the right heirs of *A.* will operate as limiting the reverſion in fee to him, which again comes to the ſame thing; as may be ſeen in Co. Litt. 22. b. where lord Coke reaſons upon the Caſe of Fenwick and Mitford and ſuch like Caſes.

It follows from hence, that the reverſion expectant on the eſtate for life limited to *B.* and on the eſtate in joint-tenancy for the lives of *B.*'s children remaining veſted in *A.* the ſame muſt paſs by *A.*'s will to *C.* one of his younger ſons in tail; with remainder to the teſtator's other three ſons and his two daughters, as tenants in common in fee.

Quære, Upon the death of *B.* To whom, and for what eſtate, did ſaid lands granted by ſaid deed-poll paſs? Does the deed of ſettlement made by *B.* in 1758 operate on any and what eſtate or intereſt *B.* had in ſaid lands? and, Whom are ſaid lands now veſted in, and for what eſtate, and with what remainders over or reverſions expectant (if any), and to whom?

Anſwer. By the death of *B.* (tenant for life) the lands here mentioned devolved by way of remainder on *D.* and on his three ſiſters, as joint-tenants for life. The reverſion paſſes by the will of *A.* to his deviſees.

The

The method of barring intails in Jamaica is eſtabliſhed by acts of aſſembly there, which have an effect ſimilar to our acts of parliament. Deeds deriving their force from acts of parliament will not operate tortiouſly, or by way of forfeiture. Wherefore, as there was no eſtate tail created by the deed poll of the 4th November 1746, I conſider the deeds executed by *B.* to bar the ſuppoſed entail, and alſo the deeds creating a new ſettlement or entails of theſe, as operating no further than as a grant of all his eſtate and intereſt in the premiſes; and he having only an eſtate for life, and that eſtate being determined by his death, thoſe deeds and ſettlements are now become mere nullities. The reſt of this *Quære* is anſwered in the third and fourth lines of this paragraph.

Lincoln's Inn, JA. BOOTH.
December 3, 1770.

MORTGAGE.

Case 1.

W. B. ſeiſed of lands in fee in a regiſter-county demiſed the ſame for five hundred years, by way of mortgage; and afterwards made his will, and deviſed the ſame to his wife for life; remainder to his children by her, being his ſecond wife, as tenants in common in fee, and dies. The wife omitting to regiſter the will, teſtator's heir at law, being in poſſeſſion under a leaſe, firſt attorned to the executor of the mortgagee; and afterwards, claiming the premiſes by deſcent, for want of regiſtration of the will, gave out, that he had mortgaged the ſame for a large ſum, and actually regiſtered the mortgage according to act of parliament.

JOSEPH BLAYDES, of Hull, ſhip-builder, did, by his will dated the 15th of September 1693, deviſe his meſſuage and yard and ſheds, and other appurtenances, to his three ſons, William, Thomas, and Joſeph, and to Anne his daughter, and to their heirs, equally to be divided between them; and William had a ſon Joſeph by his former wife.

In Hilary Term 1699, William the ſon and Elizabeth his firſt wife join with others in a fine of the fourth part of the ſaid meſſuages and premiſes; and by deed quadripartite, dated 1ſt day of April following, declare the uſes of the fine to be to the only uſe of Jeremy Shaw and William Mould, and James Mould and Benjamin Blaydes, their heirs and aſſigns for ever.

By deed dated the 5th February 1701 the ſaid William Blaydes, in conſideration of 148l. to William, and 40l. 12s. 6d. to Thomas, and 40l. 12s. 6d. to Anne, conveys the premiſes to Benjamin Blaydes and his heirs, under a *proviſo*, that if William paid to Benjamin 230l. at certain days, then Benjamin and his heirs ſhould ſtand ſeiſed of the premiſes to the uſe of the ſaid William Blaydes and his heirs; which money was paid out of mr. Mould's money, 3d April 1716. William Blaydes, in conſideration of 200l. demiſes, bargains, and ſells, to William Mould, the premiſes to hold for five hundred years, at a penny rent, under a *proviſo* to pay 210l. in April 1717: 70l. of this money was mr. Mould's, and 130l. was Thomas Blaydes' money.

William Blaydes gives by his will, dated 7th Jan. 1716, to Mary his wife for her natural life all the ſaid premiſes; and after her death, to his nine children, William, James, Benjamin, George, Thomas, Jonathan, Elizabeth, Mary, and Alice, and their heirs, equally to be divided amongſt them; and if any die before the age of twenty-one, or be married, then to the ſurvivors in fee ſimple.

—Mr. Ward's Opinion, Whether the teſtator's widow, who had afterwards regiſtered the will, may redeem the firſt mortgage, without paying off the mortgage made by the heir at law?

And

And gives to his eldeſt ſon Joſeph, by Elizabeth his firſt wife, 5l. to be paid him within a year after his deceaſe; the ſame to be in full of his claim out of his real and perſonal eſtate.

Mary, the widow of William Blaydes, by leaſe dated the 17th July 1718, demiſes to Joſeph, the eldeſt ſon by the former wife, all the premiſes for thirty-one years, at the yearly rent of 25l. and he entered to the premiſes until ejected; for John Wilkinſon paid the 200l. to mrs. Mould, executrix of mr. Mould, and takes an aſſignment of that mortgage, and has brought his ejectment and recovered poſſeſſion; and Joſeph Blaydes attorned to him, and is in poſſeſſion. Mary Blaydes the widow has tendered the principal money, with the intereſt and charges, to John Wilkinſon; and he refuſes to receive it, being in combination with Joſeph Blaydes the heir at law, who pretends the will of his father William Blaydes is void, becauſe it was not regiſtered at Beverley, according to the act of parliament; and ſince that Joſeph Blaydes has made a mortgage of the premiſes to his father-in-law Iſaac Garrett, upon pretence of 500l. borrowed of him; and has regiſtered the mortgage at Beverley.

Whether Mary the widow, who has a life-eſtate, and her and her children the reverſion in fee, by her huſband's will, can redeem the premiſes, and the firſt mortgagee be compelled to take principal, intereſt, and coſts, notwithſtanding the omiſſion to regiſter the will in time, as not knowing the act; and the will is now regiſtered? 1. Quære.

I AM of opinion, that if Garrett be really and *bonâ fide* a mortgagee for ſuch valuable conſideration, the widow and her children cannot redeem the firſt mortgage without redeeming alſo Garrett's mortgage made by the heir, for want of regiſtering the will in time; but if there was no money *bonâ fide* paid by Garrett, then the heir's conveyance to him is a voluntary conveyance without valuable conſideration; and in ſuch caſe the will is not made void againſt ſuch ſubſequent conveyance for want of regiſtering in time. Anſwer.

If a bill in chancery be adviſed, What parties muſt be made to the ſaid bill? 2. Quære.

I CONCEIVE,

Anſwer. I CONCEIVE, a bill in equity is the proper method in this caſe; wherein the heir and both Wilkinſon and Garrett, the two mortgagees, may be made parties, and the will may be eſtabliſhed, and a diſcovery had to the reality and conſideration of the latter mortgage; and the widow and her children, who muſt be plaintiffs, will be admitted to redeem, on payment of what is really due on the ſaid mortgages.

Feb. 9, 1724-5. J. WARD.

Caſe 2. 18 July, 1752. An eſtate is demiſed for five hundred years by way of mortgage, and is afterwards aſſigned

BY indenture of mortgage, Fluellin Aſpley, in conſideration of 600l. demiſes to doctor Thomas Wadſworth ſeveral parcels of land in Plaiſtow and Weſtham, therein particularly deſcribed, with the appurtenances, to hold for *five hundred years*, ſubject to redemption on payment of 600l. with intereſt, on the 18th of January then next.

for this term to a ſecond mortgagee. The mortgagor then, for ſecuring a further ſum, conveys the ſame eſtates, with other hereditaments, to a truſtee in fee for the ſame mortgagee; and afterwards deviſes his real eſtate to his three daughters, and dies. The mortgagee then deviſes all his intereſt in the mortgaged premiſes to truſtees for the benefit of *A.* and *F.* two of the mortgagor's daughters, for life, and afterwards for their children, and appoints two to be his executors, and dies. The heir at law of the truſtee in fee (who had died intestate) deviſes all her real eſtate to the ſame *A.* and *F.* and dies. *A.* deviſes her real eſtate to *F.* and dies without iſſue. *F.* then deviſed the mortgaged premiſes, with other hereditaments (after the deceaſe of one who died in her life-time), to *R. P.* and *A. O.* and dies without iſſue.—Mr. P——'s Opinion, Whether, upon this failure of iſſue of *A.* and *F.* the ſurviving executor of the mortgagor would, notwithſtanding the merger of the term of five hundred years by the latter's will, and the union of the legal fee, by the deviſe of the heir at law of the truſtee, with the equity of redemption in *A.* and *F.* compel the deviſees under *F.*'s will to the payment of the mortgage made to the teſtator of the ſurviving executor?

18 July, 1734. By indenture tripartite between Anne Oldfield, ſole executrix of the ſaid doctor Wadſworth, of the firſt part; the ſaid Fluellin Aſpley, of the ſecond part; and Thomas Hening, doctor in divinity, of the other part; after reciting the above mortgage it is witneſſed, that in conſideration of the ſaid 600l. paid by doctor Hening to mrs. Oldfield, ſhe aſſigned the premiſes to the ſaid Hening for the remainder of the ſaid term of *five hundred years*.

Doctor

Doctor Hening, being only a truſtee for Samuel Brackley, executed a deed of truſt, and aſſigned the mortgage to Brackley, with Aſpley's conſent.

By deed poll indorſed on the ſaid laſt deed, Fluellin Aſpley, in conſideration of a further ſum of 400l. then lent him by Samuel Brackley, charges the premiſes with payment of that ſum, and intereſt. 27 June 1739.

By another deed poll he charges the premiſes with 300l. more, advanced by Brackley. 21 Mar. 1739.

By indenture of mortgage the ſaid Fluellin Aſpley, in conſideration of 1200l. paid him by Brackley, demiſes to him five-ſeventh parts of two meſſuages in Baſinhall-ſtreet, and two meſſuages in Cateaton-ſtreet, to hold for *ſix hundred years*, ſubject to redemption on payment of 1248l. on the 26th Auguſt following. 27 Aug. 1740.

Indenture tripartite between the ſaid Fluellin Aſpley, and Anne, Jane, and Frances Aſpley (daughters of ſaid Fluellin), of the firſt part; the ſaid Samuel Brackley, of the ſecond part; and James Brackley, of the third part; reciting the above mortgages, and that there was then due from ſaid Aſpley to Brackley 1300l. beſides intereſt; and that a marriage was to be had between Chriſtopher Gibſon and the ſaid Jane Aſpley; and that the ſaid Aſpley had occaſion to borrow the further ſum of 1200l. (of which 1000l. was agreed to be paid by the ſaid Aſpley in part of the marriage portion of the ſaid Jane Aſpley); it is witneſſed, that in conſideration of 1300l. already advanced, and of 1200l. then paid to Aſpley by Samuel Brackley, making 2500l. the ſaid Fluellin, Anne, Jane, and Frances Aſpley did grant, &c. unto James Brackley (a truſtee nominated by ſaid Samuel Brackley), and his heirs, all thoſe five-ſevenths of the above houſes; and alſo the premiſes at Weſtham and Plaiſtow; and alſo a meſſuage called Cole Harbour, and thirteen acres of meadow, with the appurtenances, at Finchley and Barnet; and two meſſuages in the ſame pariſhes; to hold to ſaid *James Brackley, his heirs and aſſigns*, upon truſt to permit the ſaid Fluellin Aſpley and his aſſigns (ſubject to the ſaid mortgages) to receive the rents of all the premiſes for his life; and after his death, upon truſt to ſell the ſame, and thereout to pay all money that ſhall be due to the ſaid Samuel Brackley for principal and intereſt on his ſaid mortgages; and then to pay the reſidue to the ſaid Anne and Frances Aſpley equally; with a covenant, that in caſe Samuel Brackley ſhould advance any further ſum for the 28 Aug. 1740.

the advancement of ſaid Anne or Frances Aſpley, the ſaid premiſes ſhould be chargeable therewith.

8 Aug. 1741. Said Fluellin Aſpley, by will duly executed, gives all his eſtate, real and perſonal, after payment of debts and funeral, between his three daughters, Anne Aſpley, Jane Gibſon, and Frances Aſpley, it being his intention they ſhould all have equal fortunes; and appointed Chriſtopher Gibſon and Samuel Brackley executors.

Mr. Aſpley's eſtates deviſed by this will were mortgaged for the full value. He left little or no perſonal eſtate. Mrs. Gibſon received for her fortune about 3000l. which was more than one-third of her father's eſtate, and died without iſſue.

20 July, 1744. Samuel Brackley, by his will duly executed, after ſeveral deviſes of other eſtates, has the following clauſe:—

"Whereas I have ſeveral mortgages on the eſtate of my "brother-in-law Fluellin Aſpley, deceaſed, amounting to "3500l. and the ſaid eſtate is indebted to me in a conſi- "derable arrear of intereſt, and for money advanced to "pay my brother Richard Brackley's annuity due from "my ſaid brother-in-law's eſtate: now I do hereby give "and deviſe all my right, title, and intereſt, of in and to "my ſaid brother-in-law's eſtate now in mortgage to me, "and all money due to me thereout, unto my brother "James Brackley and Chriſtopher Gibſon, their heirs, "executors, and adminiſtrators, in truſt nevertheleſs to "permit my nieces Anne and Frances Aſpley to receive "the intereſt and profits during their lives, ſhare and ſhare "alike; but in caſe either of them ſhall die without iſſue, "then the ſhare of her ſo dying ſhall go to the ſurvivor. "And my will is, that in caſe my ſaid nieces, or either of "them, ſhall leave any child or children, then the ſhare "of her or them ſo leaving children, ſhall go to and be "payable to ſuch iſſue, when they ſhall attain the age of "twenty-one years; and in the mean time the intereſt and "profits ſhall be applied for their maintenance. And I "empower my ſaid brother James, and nephew Chriſto- "pher Gibſon, and the ſurvivor, to call in all ſuch mo- "ney as ſhall be due to me from the eſtates of the ſaid "Fluellin Aſpley, and to place the ſame at intereſt, on "government or other ſecurity, upon the truſts aforeſaid. "But it is my expreſs will, that if the arrears of intereſt "due to me, with the money I have paid on account of "my brother Richard Brackley's annuity, ſhall amount "to more than 500l. the overplus ſhall be paid to my exe- "cutor, and be deemed part of the *reſiduum* of my eſtate;

"it

"it being my intention, that my nieces and their chil-
"dren (if any) ſhall have only 4000l. and the intereſt as
"aforeſaid. And in caſe ſuch arrears of intereſt and what
"ſhall be due to me at my deceaſe on account of what I
"have advanced for my brother Richard Brackley's an-
"nuity, ſhall not amount to 500l. then I direct my exe-
"cutor to make up the ſame 500l. and to pay the ſame to
"my ſaid truſtees, ſubject to the ſame truſts before de-
"clared concerning the principal money due to me from
"my brother Aſpley's eſtates." Then, after ſeveral pe-
cuniary legacies, he has the following clauſes: "As
"touching all the reſt and reſidue of my perſonal eſtate,
"I direct the ſame ſhall be divided into two equal parts:
"one moiety thereof I give to my ſaid brother James
"Brackley; and the other moiety I give to my ſaid bro-
"ther, his executors, &c. upon truſt to inveſt the
"ſame upon government or other ſecurity, with the ap-
"probation of my ſiſter Dorothy Taylor; and to pay
"the intereſt and produce thereof to my ſaid ſiſter Tay-
"lor for her life; and after her deceaſe, I direct that the
"moiety ſo given in truſt ſhall be divided into two equal
"parts; and one moiety thereof I give to my ſaid bro-
"ther James, in caſe he ſhall ſurvive my ſiſter Taylor;
"and the other moiety I give to my nieces Anne and
"Frances Aſpley, to be equally divided between them,
"if both ſhall be living at my ſiſter Taylor's deceaſe;
"and if either of them ſhall be dead, then to the ſurvi-
"vor; and in caſe they ſhall both die before my ſiſter
"Taylor, then I give 1000l. thereof to Chriſt's Hoſpital,
"and the ſurplus unto my ſaid brother James, his exe-
"cutors and adminiſtrators."—And appoints his bro-
ther executor.

James Brackley by his will gives Anne and Frances Aſpley 1000l. a-piece: then he gives his two farms in Bedfordſhire and 6000l. unto Chriſtopher Gibſon and ſir Anthony Abdy, upon truſt to permit his ſiſter Taylor to receive the rents and profits for life; and after her death, then to permit the ſaid Anne and Frances Aſpley, and the longeſt liver of them, to receive the rents and profits during their lives; and after their deaths, he gave the ſame to the heirs of their two bodies jointly; and declared, that the 6000l. ſhould be deemed as if veſted in lands: but if Frances and Anne Aſpley both died without iſſue, then he gave the whole to ſir Anthony Abdy and his ſon; and appointed Dorothy Taylor, Anthony Abdy, and Chriſtopher Gibſon, executors. 31 Dec. 1744.

The

4 Adril, 1745. The ſaid Dorothy Taylor by her will gave unto Anne and Frances Aſpley, her nieces, all her wine, plate, and diamonds, with all the reſidue of her eſtate, real and perſonal, to be equally divided between them; and appointed Gibſon executor.

19 Dec. 1753. The ſaid Anne Aſpley by will, after many legacies, gives the reſidue of her eſtate to her ſiſter Frances; and appointed her and Gibſon executors.

17 Sept. 1757. Frances Aſpley by her will (which is of her own writing) *(inter alia)* deviſes as follows:—"I will to "Tryon Perkins all my eſtate called Cole Harbour on "Finchley Common, and Millhouſe, two tenements at "Whetſtone; likewiſe all my eſtate near Ham, com- "monly called Pigwell, with the two fields at Ham; like- "wiſe my five-ſeventh parts of four houſes near Guildhall "during his life; and after his deceaſe, to Rebecca "Price and Anne Owen."—She then proceeds in be- queathing ſeveral pecuniary and ſpecific legacies, without mentioning any thing further of the above deviſed eſtate; and concludes thus:—"All the reſt and reſidue of my "eſtate I give and bequeath to mr. Chriſtopher Gibſon; "and do conſtitute and appoint him my ſole executor."

The eſtate above deviſed was charged with an annuity of 60l. a-year, which ſtill ſubſiſts.

Tryon Perkins died in the life of the teſtatrix.

In April laſt Frances Aſpley died without iſſue, ſeiſed of the above eſtates, and of a freehold eſtate at Kenſington; and alſo poſſeſſed of a very conſiderable perſonal eſtate, abundantly more than ſufficient to ſatisfy her debts (which were very trifling) and legacies. Upon her death mr. Gibſon proved her will, entered into the freehold eſtate at Kenſington, and poſſeſſed himſelf of the perſonal eſtate.

Mrs. Price and miſs Owen have taken poſſeſſion of the eſtates which were deviſed to them after the death of Tryon Perkins.

Two things are inſiſted on by mr. Gibſon: Firſt, He inſiſts, that the mortgages made by Fluellin Aſpley to Samuel Brackley ſtill ſubſiſt, and are a charge on ſuch parts of the eſtates deviſed to mrs. Price and miſs Owen as were compriſed in thoſe mortgages, notwithſtanding the bequeſt in Samuel's will to the miſs Aſpleys; and although no demand was ever made on that account by James the executor of Samuel, or by the executors of James, or any other perſon. Secondly, He inſiſts, that mrs. Price and miſs Owen take only a life eſtate under the will of Frances

Frances Aſpley in the premiſes deviſed to them; and that as by the deviſe of the reſidue of the eſtate to miſs Gibſon he has the reſidue of her eſtate to mr. Gibſon, he takes the reverſion and inheritance.

Whether the money due upon the above mortgages was not remitted by mr. Samuel Brackley's will, and abſolutely given to the miſs Aſpleys and the ſurvivor of them, ſo as to diſcharge the eſtates now deviſed to mrs. Price and miſs Owen from the payment of it? 1. Quære.

N. B. Theſe eſtates were enjoyed by the two miſs Aſpleys during their joint lives, and by the ſurvivor, without ever being called upon by the repreſentatives of Samuel or James Brackley for the money due on the mortgages; it having been always underſtood, till now, that theſe eſtates were diſcharged of the mortgages by the will of Samuel Brackley; and if theſe mortgages ſtill ſubſiſt, the intereſt thereof, with the annuity of 60l. *per annum*, will quite exhauſt the rents of the eſtate.

The mortgage is ſtill ſubſiſting, in point of law, for the terms for years paſſed by Brackley's will to the Aſpleys; whereas the fee remains in the premiſes by the deed of 28th Auguſt 1740; ſo that there could be no legal merger. But in this caſe, which is very particular, I would conceive, that when the equity of redemption in the whole fee veſted in Frances Aſpley, together with the whole right to the mortgage, they were ſo united together in equity, that the mortgage, as well as the eſtate in the land, paſſed by her will, by the deviſe of the eſtate; and conſequently, mrs. Price and miſs Owen are entitled to both. Anſwer.

Can mrs. Price and miſs Owen compel mr. Gibſon (as executor to Frances Aſpley, the ſurviving co-heir of the mortgagor) to pay off the mortgage out of her perſonal eſtate, which was ſufficient for that purpoſe? 2. Quære.

THIS kind of equity is not applicable to the preſent Caſe; for mrs. Aſpley was entitled both to the mortgage Anſwer.

and the equity of redemption; ſo that if mr. Gibſon could claim the mortgage money by the will, he would have the ſame right to hold this as the deviſee of the land could have to hold the eſtate; and the perſonal eſtate is never applied to exonerate the land, but where the charge is the proper debt of the anceſtor. But here, mrs. Aſpley being entitled to both was both debtor and creditor, or in truth neither; for both were conſolidated together.

3. Quære. What eſtate do mrs. Price and miſs Owen take in the lands deviſed to them by the will of Frances Aſpley? Whether a joint eſtate for life or in fee?

Anſwer. I AM of opinion, that mrs. Price and miſs Owen take only an eſtate for life by this will in the land; but if the mortgage money paſſeth to them by the ſame claim, it may be a doubt, whether they are not entitled to the money abſolutely. This is a point of ſome nicety; but I incline to think, they took no more than an eſtate for life in both.

Mrs. Aſpley by her will gives a legacy of 200l. to mrs. Price, and 200l. to her daughter, but has not appointed any time for payment of any of her legacies. Her debts were trifling; her perſonal eſtate very conſiderable.

4. Quære. Can mrs. Price and her daughter compel mr. Gibſon, the executor, to pay off theſe legacies immediately?

Anſwer. THEY are entitled to their legacies, with intereſt, a year after the teſtatrix's death.

October 11, 1758. *D.*

IT

Case 3.

The Opinion of an eminent modern Counsel upon several points respecting the payment of money secured by mortgage, and the production of the security to the mortgagor or his agents.

IT is clear, that a mortgagee may call in his mortgage money when he pleases, and may require it to be paid at as short a warning as he pleases; for it never was held, that upon a trial of an ejectment, or upon a bill to foreclose, the plaintiff should be nonsuited, or the bill dismissed, because the mortgagee did not give six months notice to pay the money in, or any other definitive notice. The reason is, because at law the estate is his own; and no notice is requisite to entitle a man to recover his own who stands in the situation of a mortgagee; so that whenever the mortgagee calls for his money, the mortgagor must pay it; and the mortgagee may at his pleasure proceed at law to recover the possession, or in equity to foreclose. But the mortgagor is not in the same situation: he cannot compel the mortgagee to take his money at a moment's warning; he must give the mortgagee six months notice to recover it; or, which is the same thing, pay him six months interest in advance; because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist unless he will do equity: and the court holds, that it is equitable that the mortgagor shall give six months notice of paying in the money, to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice. But when the mortgagee requires payment, all notice is out of the case: it is not notice but a demand, which the mortgagee has a right to make, without any limitation of time whatever; and consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day, and if he refuses to receive it he can no longer demand interest; for his demand of the money has made notice from the mortgagor wholly unnecessary. When the mortgagee has demanded payment of his money,

it muſt be brought to him perſonally; for though a place of repayment is mentioned in the mortgage-deed, yet the day of repayment being paſſed, the mortgagee is not bound to attend there; and therefore it muſt be brought to him perſonally. It is thus upon a general demand; but he may give a ſpecial notice. The mortgagee, when he makes the demand, has a right to appoint a time and place for payment of the money; and then the mortgagor muſt attend at the time and place prefixed by the mortgagee to tender the money; otherwiſe intereſt will run on to the time of actual payment. But if the mortgagor comes with the money to the mortgagee, or to the time and place appointed, he has a right to require a production and delivery of the mortgaged-deed, and to have it delivered up to him; as the production and delivery of the mortgage-deed is the proper evidence to the mortgagor that the mortgagee has not aſſigned the mortgage to any other perſon, but has the right to receive the money. Suppoſe the mortgagee has received the money from a third perſon and aſſigned over and delivered the mortgage-deed to the aſſignee, and then calls on the mortgagor, who is ignorant of the aſſignment, for the money, and he pays it without requiring to have the mortgage-deed delivered up, moſt certainly the aſſignee can have no benefit of the mortgage, nor compel him to pay it over again, though the original mortgagee who received the money is become inſolvent. But this is confined to the delivery of the mortgage-deed; for the mortgagor has not a right to annex a condition to the payment, that the mortgagee ſhall execute an aſſignment; becauſe it frequently happens, that a proper aſſignment or reconveyance cannot be prepared without an inſpection of the title-deeds in the mortgagee's hands; and it is underſtood, that a mortgagee is not compellable to produce the title-deeds before he has actually received his money; for otherwiſe, under pretence of repayment, the mortgagor may look into the title-deeds with a view

to

to diſcover faults and defeat the ſecurity: but the mortgage-deed itſelf, which puts him in the character of mortgagee, and without which he cannot reſiſt the production of the title, muſt always be open to the inſpection of the mortgagor, that he may know his right to redeem. It follows, therefore, that when the mortgagor comes to pay his money, either to the mortgagee himſelf or to his agent, at a time and place appointed, he has a right to expect to find the mortgage-deed there, and that it ſhall be ready to be delivered to him when the money is paid; and when that has been done he has a right to call for title-deeds, to enable him to prepare a proper aſſignment, and to call on the mortgagee to execute it afterwards. The mortgagor is in no danger in paying the money, upon receiving the mortgage-deed without an aſſignment; becauſe the mortgage and the receipt together will always ſhew what the debt is, and that the debt is ſatisfied; and from thenceforth the mortgagee becomes a truſtee for the mortgagor of the legal eſtates.

Auguſt 19, 1786. *A.*

PAPIST AND PROTESTANT PURCHASERS.

CASE I. 1685. Sir Lawrence Anderton's family eſtates being forfeited by attainder of one of the family, Sir Lawrence lays his claim before the commiſſioners under 11th and 12th of *W.* 3. which is diſmiſſed, he having been educated abroad in the Popiſh religion; but afterwards, upon an appeal to the court of delegates, allowed.—Mr. PIGOTT's and Mr. WARD's ſeveral OPINIONS, Whether Sir Lawrence, being a Papiſt, could diſpoſe of the ſaid eſtates, by reaſon of the incapacities in the ſeveral acts relating to perſons of that perſuaſion? and Whether copyholds are within the diſabilities of theſe acts?

SIR Charles Anderton being ſeiſed of the manor of Loſtock, &c. *in cum Lancaſt.* and of Kendal caſtle and part *in com. Weſtmoreland*, and Weſt Bradford *in com. Ebor.*

30 Aug. 1685. The ſaid ſir Charles Anderton ſuffered a recovery of the premiſes *in com. Lancaſt.* and by indenture made

1ſt Aug. 1685. Sir Charles ſettles the ſaid premiſes in Lancaſhire to the uſe of himſelf for life; remainder to truſtees to preſerve contingent remainders; remainder as to part to dame Margaret for life for her jointure; and as to the whole, after the determination of the precedent eſtates, to the firſt and every other ſon of the ſaid ſir Charles, begotten on the body of the ſaid dame Margaret in tail male; remainder to ſir Charles in tail male, with divers remainders over; and remainder to ſir Charles in fee: and as to the Yorkſhire and Weſtmoreland eſtates, to the uſe of himſelf in fee.

30 Dec. 1691. Sir Charles died, and left iſſue by Margaret, Charles, James, Lawrence, Francis, and Joſeph; and three daughters, Mary, Elizabeth, and Anne. Sir Charles the ſon entered, and was ſeiſed, and died without iſſue; and his brother, ſir James entered, and was ſeiſed.

20 and 21 Feb. 1705. By leaſe and releaſe made between the ſaid dame Margaret Anderton and ſir James Anderton, her ſon, of the one part, and John Moreton of the other part, the ſaid dame Margaret and ſir James convey all the ſaid manors, &c. *in com. Lancaſt.* to the ſaid Moreton and his heirs, to the intent to make him tenant of the freehold, and that a recovery might be ſuffered.

14 Mar. 1705. A recovery ſuffered accordingly; and the uſes thereof are declared by indenture dated the 21ſt Feb. 1705 as to part

part of the ſaid premiſes, to the intent that ſir James, Lawrence, and Joſeph, might each of them receive 50l. *per ann.* for their lives; remainder for raiſing ſuch annuities for dame Elizabeth Anderton, Frances, Elizabeth, and Anne Anderton, as they were intitled to by any former deeds, with ſeveral limitations which are determined; remainder to Francis Anderton in tail male; remainder to Joſeph Anderton in tail male; remainder to Francis in tail; remainder to Joſeph in tail; remainder to ſir James in fee.

Francis Anderton entered in the year 1708, ſuffered a recovery of the ſaid eſtate, and by indentures,

Francis, in conſideration of a marriage and a marriage-portion, ſettles the ſaid manors *in com Lancaſt.* amongſt other truſts, to the uſe of himſelf for life; remainder for raiſing a rent-charge of 500l. *per annum* for his intended wife for her jointure; with divers remainders over. 28 and 30 July 1708.

James, Francis, and Joſeph Anderton, and Mary and dame Margaret, were on the 20th and 21ſt Feb. 1705, and are Papiſts.

Sir James died. 16 Oct. 1710.

Francis was convicted and attainted of high treaſon. 7th July 1716.

Sir Lawrence was educated, and ſtill is, a Papiſt; and before he was twenty-one years of age he was ſent, or did go, to St. Omer's, to ſtudy and be educated in his religion; and continued there for ſeven years, and is a Benedictine Monk.

Sir Lawrence entered his claim before the commiſſioners and truſtees for the forfeited eſtates; but inaſmuch as no deed was executed to make a tenant to the freehold, the recovery ſuffered by ſir Charles, the father, in 1685, was not well ſuffered, and no alteration was made in the eſtate thereby; and admitting the ſaid recovery was well ſuffered, yet the deed declaring the uſes thereof did not create an eſtate tail in ſir Lawrence. After 10th April 1700, all the ſons of ſir Charles, the father, were incapable of taking, either by deſcent or purchaſe, by virtue of the ſtatute 11th and 12th of king William; and eſpecially ſir Lawrence was diſabled to take in any capacity whatſoever, by reaſon of his being a monk profeſſed. Admitting there had been an incapacity in any of ſir Charles's ſons, but that the eſtate had veſted in ſir James after the death of his brother Charles, yet ſir Lawrence could have no intereſt in the premiſes, for that the ſame were ſettled (by ſir James, as much as in him lay) on Francis before his attainder, by the ſaid deeds and recovery in 1705; and therefore

therefore the ſaid manors, &c. became forfeited, and the commiſſioners diſmiſſed the ſaid ſir Lawrence's claim. Sir Lawrence appealed from this decree to the delegates, who declared, that ſir Lawrence having been ſent into, reſident, and inſtructed in the Popiſh religion in a Popiſh ſeminary beyond ſea, is thereby ſubject to and hath incurred ſuch diſabilities as are in that caſe mentioned and contained in the ſtatute 1 James I. for the due execution of the ſtatutes made againſt Jeſuits, ſeminary prieſts, and recuſants; therefore as to ſuch eſtate, right, title, and intereſt in and to the manors, &c. as the ſaid ſir Lawrence by having been ſent into, reſident and inſtructed, as aforeſaid, in a Popiſh ſeminary, within the ſaid act, is not thereby diſabled to inherit, take, have, or enjoy in reſpect of his heirs and poſterity. The ſaid delegates were of opinion, and did decree, order, and adjudge, that the decree and judgment of the commiſſioners ſhould be reverſed, and the ſaid ſir Lawrence's claim allowed. And as to ſuch eſtate, right, title, and intereſt in and to the ſaid manors, &c. as the ſaid ſir Lawrence, by having been ſent into, reſident and inſtructed in a Popiſh ſeminary, within the ſaid act, is thereby diſabled to inherit, take, have, and enjoy, in reſpect of himſelf only, the ſaid delegates were of opinion, and did decree, order, and adjudge, the ſaid decree and judgment of the ſaid commiſſioners; and the ſame was thereby affirmed.

1. Quære. If ſir Lawrence can ſettle, ſell, or otherwiſe diſpoſe of the ſaid manors, &c.?

Mr. PIGOTT'S OPINION. I AM of opinion, the general pardon 7th Anne pardons the offence committed by ſir Lawrence's foreign education, and the conſequence thereof; but ſir Lawrence cannot ſettle or mortgage the ſaid manors, &c. but may ſell them to a Proteſtant for a full and valuable conſideration, ſince the ſtatute of the 3d Geo. Rex has enacted, that no ſale to any Proteſtant purchaſer ſhall be avoided or impeached by any of the diſabilities or incapacities in the ſtatute of 1 James I. 11. and 12 W. 3. or any other act contained; and the act of 3 Geo. Rex being made for ſecurity of Proteſtant purchaſers, ought to have a liberal conſtruction. And I think, before the making ſuch act of the 3d Geo. Rex, if a Papiſt under the incapacities of the

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act 1 James I. had ſold before any inquiſition found or entries made, the ſale was good; and ſo the better opinions of the lawyers ſeem to be: but the ſtatute 3 Geo. Rex, I think, has very fully cleared this point.

If the copyholders lands are within any of the before-mentioned acts? 2. Quære.

I AM of opinion, copyholders are not within any of the acts; and if ſir Francis had been actually ſeiſed of copyholds, they had not been forfeited, and conſequently never veſted in the commiſſioners. Anſwer.

8th April, 1723. NATH. PIGOTT.

I THINK, the act of pardon 7th Anne which pardons the offence, and having general words and does not except the ſtatute 1 James I. and ſuppoſing that pardon did not prevent this diſability, I ſhould take the better opinon ſtill to be, that a perſon diſabled by the ſtatute 1 James I. may ſell the inheritance: but I conceive this point to be cleared beyond queſtion by the clauſe of 3 Geo. for the ſafety of Proteſtant purchaſers, expreſsly againſt the diſabilities in the act 1 James. And the only difficulty which occurs to me in this Caſe, ariſes upon what the Judges might mean by their decree to leave in the commiſſioners of forfeitures, by diſallowing ſir Lawrence's claim as to what he was diſabled to claim; which I do not very well underſtand, but conceive that cannot mean or affect the inheritance; and am of opinion, that he may ſell, and a Proteſtant ſafely purchaſe the inheritance, ſubject only to what particular right may be meant to be excepted in that decree; which cannot go farther than his forfeiture of his profits during his life, and might be ſold by the commiſſioners, if in them. Mr. Ward's Anſwer to the Firſt

I AM of opinion, that the act 1 James I. does not extend to copyholds, nor were they intended to be veſted and Second Quære.

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in the commiſſioners of forfeitures by the late acts of parliament; but whatever copyholds deſcended to or were veſted in ſir Lawrence, remain in him, free from any queſtions ariſing upon theſe acts, and may be ſold and diſpoſed of by him.

11th April, 1723. J. WARD.

CASE 2. July 30, 1715. A teſtator deviſes ſeveral eſtates to three perſons, and then declares his will to be, that if they, or either of them, ſhould ſue or moleſt certain others, deviſees in his will named (who were papiſts), in the peaceable enjoyment of other eſtates which he had given them, the ſaid deviſees, or ſuch perſon or perſons that ſhould ſue, diſturb, &c. ſhould not take any benefit under his will—SERJEANT RABY'S OPINION, Whether a diſturbance by one of the deviſees would defeat the deviſe made to the others? and, Whether a condition in ſupport of a deviſe to a Roman Catholic is good?

SIR Henry St. George by his will deviſes ſeveral eſtates to Thomas, Paul, and Peter Dayrell; and after declares his ſaid will, intent, and meaning to be, that in caſe Paul Dayrell and Thomas Dayrell, or either of them, ſhall ſue, moleſt, vex, or diſturb, Dorothy and Elizabeth Haſtings, who were papiſts, in the peaceable enjoyment of an eſtate which he had deviſed to them at Waltham Holy Croſs, or any part thereof, that then the ſaid Peter Dayrell, Thomas Dayrell, or ſuch perſon or perſons that ſhall ſue, diſturb, &c. ſhall not take any benefit by any deviſe in his ſaid will, but the ſame to be utterly void.

1. Quære. Will the diſturbance by one deviſee defeat the deviſe to all the three brothers, or to ſuch deviſee only?

Anſwer. UPON peruſal of the will of ſir Henry St. George, I conceive the act or diſturbance of one of the brothers will not defeat the eſtate deviſed by his will to the other brothers, or either of them.

2. Quære. If Thomas may not cut the entail off by recovery?

Anſwer. THE condition in ſupport of a deviſe to Roman Catholics, which is againſt law, is, I think, for that reaſon alſo void.

Nov. 29, 1715. J. RABY.

A. B.

CASE 3. The next proteſtant heir to the eſtate of a papiſt being about to proceed for the recovery of the latter's eſtate—Mr. WILBRAHAM's OPINION upon the proof of papiſtry neceſſary to be adduced.

A. B. ſeiſed in fee of lands, died without iſſue, or making any diſpoſition thereof, having only two ſiſters, who are papiſts, and upon his deceaſe entered upon the lands, and are now in the poſſeſſion thereof, notwithſtanding they are incapable by the ſtatute 11 and 12 Will. III. c. 4. to inherit this eſtate, and refuſing to take the oaths of allegiance and ſupremacy, being both above the age of eighteen years, have ſeverally regiſtered the eſtate; and *C. D.* who is the next proteſtant heir to *A. B.* hath brought his ejectment for the recovery of the lands during their incapacities.

Quære.

What matters are neceſſary to be given in evidence, on the trial of the ejectment, to prove the ſiſters papiſts, over and beſides their regiſtering the eſtate? Will it be ſufficient, to maintain the ejectment, to prove they are reputed and eſteemed by all people to be papiſts, and that they never reſort to any of our churches, or to any other proteſtant aſſemblies for divine worſhip, of any denomination whatſoever? or, What other proofs will be required of us in this caſe?

Anſwer.

THE iſſue will be, Whether the ſiſters are perſons profeſſing the popiſh religion or not; and it is impoſſible to determine what will be ſufficient evidence to convince a jury of this fact. The proof of their going to maſs would be the ſtrongeſt proof. Their going to popiſh ſervice, and their not going to church, and the common reputation that they are papiſts, and if they have ever owned themſelves to be papiſts, will be very proper and very ſtrong evidence of their profeſſing the popiſh religion.

February 20, 1737. R. WILBRAHAM.

Whether

Case 4. Mr. Fazakerley's Opinion, Whether under 3 Geo. I. a papiſt under the diſabilities of 11 and 12 Will. 3. could ſafely convey to a proteſtant purchaſer for a valuable conſideration?

Whether a PROTESTANT PURCHASER *under Mr.* D. C. *and his* Son *could be evicted?*

IN Caſes where there is any room to doubt, as there is in this preſent Caſe, it is difficult to put any certain conſtruction upon the act of parliament of 11 and 12 Will. 3. which to ordinary underſtandings ſeems to have been extended beyond the meaning of it; but, in my opinion, the defendant may make a good title; but whether ſuch as a purchaſer's counſel will approve of, is too much for me to ſay.

MR. WILBRAHAM's OPINION *on the ſame* QUESTION.

Mr. Wilbraham's Opinion on the above Queſtion.

THE act 3 Geo. 1. intended to encourage Roman Catholics to ſell, and proteſtants to purchaſe their real eſtates; and for that purpoſe enacts, "That no ſale for a full con-"ſideration, by any perſon reputed owner, or in poſſeſſion "or receipt of the rents, then made or thereafter to be "made, to or for any proteſtant purchaſer, ſhall be avoid-"ed or impeached for or by reaſon or on pretence of any "diſabilities or incapacities mentioned in 11 and 12 "Will. 3. incurred by any of the perſons making or join-"ing in ſuch ſale, or by any other perſon or perſons "from or through whom the title of ſuch lands is or ſhall "be derived." Then there is a *proviſo* added, reciting the clauſe of 11 and 12 Will. 3. which diſables papiſts to purchaſe; and then declares, that "the ſaid recited part of "the ſaid act ſhould not be thereby altered or repealed, "but ſhould be in full force."

And though there may have been ſome Opinion, that this clauſe had diſabled papiſt purchaſers from ſelling, the act declaring, that "the clauſe by which they were diſa-"bled to take ſhould ſtand in full force;" and therefore as they were diſabled to take, ſhould be diſabled to grant ſuch eſtates;

eſtates;—yet I think, this act of 3 Geo. as it was calculated to clear the titles of Roman Catholics, if they were the viſible and reputed owners, and in the poſſeſſion of their lands, notwithſtanding they were under any of the diſabilities or incapacities mentioned in the act of 11 and 12 Will. 3. will enable papiſts taking by purchaſe to ſell: for their being the reputed owners, and being in poſſeſſion, gives them a title, or rather a power, to ſell: and under this notion they may make a good title, if they had not a good title themſelves: for otherwiſe the enacting clauſe could mean nothing; for as it gives them a power to ſell notwithſtanding any diſabilities, ſo it is plain that the legiſlature intended that they might make a good title, though they had not one themſelves; ſo that the title, as ſoon as it comes into the hands of a proteſtant purchaſer, may be good, though it was not ſo in the hands of a papiſt vender: and the *proviſo* (though it is not accurately inſerted) was, I think, only intended to declare, that this act, though it gave papiſts a power to ſell, and therefore might implicitly be conſtrued to give them a power to purchaſe, ſhould not have that effect, but that the clauſe of the ſtatute of Will. 3. which diſables them to purchaſe, ſhould ſtill ſtand in force. And therefore I think, that though this may be a matter of ſome doubt, yet as the opinion of the Eminent Conveyancers from the time of paſſing the act in 1717 till about the year 1740 has been, that popiſh purchaſers may ſell; and as it is the opinion of the preſent Chancellor, and ſeveral eminent lawyers, they may ſell; I am of the ſame opinion; though the court of king's bench ſeemed to be of a contrary opinion in a trial at bar, in the year 1741, between Fairchild and Newland.

May 6, 1749. R. WILBRAHAM.

CASE 5.
A Roman Catholic deviſes his eſtates in fee to four truſtees (two of whom are Proteſtants and the other two are Papiſts), in truſt, with the rents and profits, or by mortgage or ſale thereof, to pay teſtator's debts, and to pay the rents and profits of ſo much of the eſtate as ſhould remain unſold for the benefit of his youngeſt ſon, who is a Papiſt —Mr. WILBRAHAM'S OPINION, Whether the deviſe in truſt for the youngeſt is void by the 11 and 12 of Will. 3.? and, Whether the heir at law, being a Papiſt, can recover the eſtate?

A A Roman Catholic, ſeiſed in fee of ſeveral real eſtates of lands and tenements in the county of *W.* died without lawful iſſue, having firſt made his will, and thereby deviſed all his ſaid eſtates to *B.* another Roman Catholic, his nephew and heir at law, his heirs and aſſigns. *A.* died ſoon after the making his will, and *B.* entered upon and took poſſeſſion of the eſtates, and enjoyed them during his life. *B.* is alſo dead, and left three ſons, *C. D.* and *E.* all Roman Catholics, and all paſt twenty-one at the death of *B.* who by his will has deviſed all the meſſuages, lands, and tenements, left by *A.* to *F. G. H.* and *I.* two of whom are Proteſtants, and the other two Roman Catholics, and to their heirs, executors, adminiſtrators, and aſſigns, with their and each and every of their rights, members, and appurtenances, whereof or wherein ſaid *B.* was ſeiſed of his own right, or whereof or wherein any other perſon or perſons in truſt for him, or for his uſe and benefit, had any eſtate of freehold or inheritance, or other right, title, intereſt, or term of years in poſſeſſion, reverſion, remainder, or expectancy (except as in the ſaid will is excepted); to hold all the ſaid meſſuages, lands, premiſes, and all his perſonal eſtate whatſoever and whereſoever, unto the ſaid *F. G. H.* and *I.* their heirs, executors, adminiſtrators, and aſſigns, upon the truſts and to and for the ſeveral uſes and purpoſes in the ſaid will of *B.* mentioned, *viz.* upon ſpecial truſt and confidence that the ſaid truſtees, or the ſurvivors or ſurvivor of them, his heirs, executors, or adminiſtrators, did and ſhould, with all convenient ſpeed after the death of *B.* make ſale of all his ſaid perſonal eſtate, and by and with the money ariſing by and with ſuch ſale or ſales, and alſo by, with and out of the yearly and other rents, iſſues, and profits, of all the ſaid meſſuages, lands, tenements, and premiſes, ſo given and deviſed, or by leaſing or mortgaging, or by the actual ſale thereof, or of ſome convenient part thereof, or by all or any of the ſaid ways or means, or otherwiſe in ſuch manner as to his truſtees ſhould appear moſt convenient and adviſeable, levy and raiſe ſo much, or ſuch ſum and ſums of money, as ſhould be neceſſary to pay and diſcharge a certain mortgage or ſecurity for the ſum of 4000l. principal money charged upon the ſaid lands and premiſes, or ſo much of the ſaid principal money, or the intereſt due for the ſame, or that ſhould be due at his death; and that his ſaid truſtees ſhould alſo

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pay and diſcharge, ſo ſoon as conveniently might be, his funeral expences, and all ſuch other debts as ſhould be owing by him at his death, and all ſuch legacies that in and by his ſaid will, or codicil or codicils to be annexed thereto, he ſhould give or bequeath to any perſon or perſons whatſoever; and to the intent alſo, that his ſaid truſtees might deduct and detain all ſuch charges and expences they might pay or be put unto in the execution of the ſeveral truſts ſo repoſed in them by his ſaid will; and after payment of the ſaid debts, legacies, funeral expences, and ſaid truſtees coſts and charges, upon the further truſt and confidence that they the ſaid truſtees, and the ſurvivors and ſurvivor of them, and his heirs, ſhould from time to time well and duly pay the rents, iſſues, and profits, of the ſaid meſſuages, lands, and premiſes, or ſuch part or parts thereof as ſhould remain unſold after all the ſaid truſts were performed, unto and for the only proper uſe and benefit of his youngeſt ſon the ſaid *E.* and his heirs, for his or their own uſe and benefit; and appointed the ſaid truſtees his executors.

The truſtees have not proved the will, but are in poſſeſſion of both the deviſed real and perſonal eſtates, and propoſe to raiſe money to pay off all the debts of the teſtator in a little time. The deviſed real eſtates, beſides the perſonal eſtate, are of very great value, more than ſufficient to pay all the debts chargeable upon them by the teſtator.

Is the deviſe to *F. G. H.* and *I.* a good deviſe in law for the uſe of *E.* though a papiſt, and the youngeſt ſon of the teſtator? or, Is the deviſe of the real eſtate void as to *E.* and will deſcend to *C.* the heir at law of *B.* the teſtator, as undiſpoſed of by *B.*? Can a Roman Catholic, in any manner, prevent his real eſtate from deſcending to his heir, after all debts paid it may be incumbered with? and, Are all deviſes of real eſtates by a Roman Catholic, either immediately to a papiſt, or to any perſons in truſt for him, and all deviſes of lands, or terms for years in lands, or any other profits ariſing out of lands, whether to proteſtant or papiſt truſtees, abſolutely void, if for the uſe of a papiſt? 4. Quære.

I THINK, that the deviſe of this eſtate to truſtees in truſt for *E.* who is a papiſt, is abſolutely void by 11 Will. 3. by which act every papiſt is diſabled to purchaſe, either in his own name, or in the name of any other perſon in truſt for him, any lands; and it is alſo enacted, that all eſtates, &c. Anſwer.

&c. to or for the uſe of any ſuch perſons, or upon any truſt or confidence, mediately or immediately, to or for the benefit of any ſuch perſons, ſhall be utterly void and of none effect to all intents whatſoever. And I think, that as the deviſe is void, the eſtate will deſcend upon *C.* as the heir at law of the teſtator: for I think, that as the deviſe is void by reaſon of the incapacity of the deviſees, the eſtate muſt neceſſarily deſcend upon the heir at law, who though a papiſt, is capable of taking for the benefit of his heirs: but the next proteſtant akin (if he thinks fit to exert his power) has a right to the poſſeſſion and perception of the profits during the non-conformity of the heir.

A papiſt may, in his life-time, convey his eſtate to a proteſtant for a valuable conſideration, or he may deviſe to a proteſtant: but I think, that all deviſes of real eſtates by a papiſt, or to any perſon in truſt for a papiſt, and all deviſes of lands, or terms of years out of lands, or terms of years in lands, or any profits out of lands, whether to proteſtants or papiſts, are abſolutely void, if for the uſe of papiſts.

3, Quære. If the deviſe for the uſe of *E.* be void, Muſt not the truſtees apply the perſonal eſtate left by *B.* in the firſt place towards the diſcharge of all *B.*'s debts, as well by mortgage and bond as ſimple contract? and, Which of the debts ought the perſonal eſtate be firſt applied to diſcharge?

Anſwer. I THINK, that though the deviſe to the truſtees of the reſidue of the eſtates in truſt for *E.* is void, yet that the truſtees may apply the perſonal eſtate left by *B.* in the firſt place towards the diſcharge of all *B.*'s debts, as well by mortgage and bond as by ſimple contract: but I think, that the perſonal eſtate, in a due courſe of adminiſtration, ought to be paid and applied in the diſcharge of the debts by ſpecialty in the firſt place; but if they are ſo applied, then,

then, I think, that all the ſimple contract debts will be payable out of the lands, which are made equitable aſſets by the will; ſo that I think, that if the perſonal and real aſſets together are ſufficient to pay all the debts, that then it is of no conſequence which of the debts are paid firſt.

If the heir at law of *B.* be entitled to the ſurplus of the real eſtates, after all debts of *B.* are diſcharged, Is ejectment the propereſt remedy for the heir at law, or a bill in equity? or, Is any and what other remedy properer than either, if the heir at law ſhould be provoked to diſpute the validity of *B.*'s will? 3. Quære.

IT is not poſſible, I think, for the heir at law to recover theſe lands at law; becauſe the legal intereſt, I think, is in the truſtees; but he muſt be obliged to come into a court of equity, in order to ſee that the truſts of the will are executed by the diſcharge of all the debts, before any title can accrue to him; and if he brings ſuch bill, it is probable, that this may irritate *E.* to ſuch a degree as to engage him to ſet up a proteſtant next akin, who may, I think, take the eſtate both from *C.* and *E.* Anſwer.

If *A.* the firſt teſtator purchaſed any of theſe eſtates in the name of a proteſtant, in whoſe heirs the eſtate at law ſtill is; What in ſuch caſe will be moſt adviſeable, for *C.* to avoid being non-ſuited in an ejectment? 4. Quære.

He cannot avoid being nonſuited, in all probability, becauſe *primâ facie* the eſtates will appear to be veſted in the proteſtant purchaſers; and that will be a legal title, unleſs he can prove, that the lands were purchaſed in truſt for *A.* ſo that it may be adviſeable for *C.* to exhibit a bill againſt the truſtee, or the heir of the truſtee, for a diſcovery of this truſt, before he brings an ejectment, if he thinks it worth his while to bring an ejectment. Anſwer.

Sept 7, 1756. R. WILBRAHAM.

CASE 6.

A papiſt conveys an eſtate to three truſtees, of whom one is a papiſt, and the other two are proteſtants, and their heirs in truſt, to ſell and pay certain ſcheduled debts, and afterwards in truſt for the catholic truſtee. One of the proteſtant truſtees dies. Suit is afterwards inſtituted by the next proteſtant heir at law of the papiſt, for the recovery of the eſtate.—Mr. WILBRAHAM'S OPINION, With what ſafety the ſurviving proteſtant truſtee, who has never acted in or been appriſed of the truſt, can concur in a conveyance of the eſtate to a purchaſer: and, in what manner he may protect himſelf.

BY indentures of leaſe and releaſe, bearing date reſpectively the 29th and 30th days of April which was in the year of Our Lord 1736, and inrolled in the high court of chancery, and reſpectively made or mentioned to be made between Merry Simpſon, of Barton Park, in the county of Derby, eſq. of the one part, and Robert Freeman, of ———, gent. Gervaſe Balguy, of Hope, in the ſaid county of Derby, gent. (ſince deceaſed), and Thomas Waterhouſe, by the name of Thomas Waterhouſe, of Caſleton, in the ſaid county of Derby, gent.; in conſideration of the ſum of 500l. in the ſaid indenture of releaſe mentioned to be paid to the ſaid Merry Simpſon by the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, ſome or one of them; and alſo in conſideration of the further ſum of 7500l. in the ſame indenture mentioned and agreed to be paid by the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, in diſcharge of the ſeveral debts, ſecurities, or ſums of money, in a ſchedule to the ſaid indenture of releaſe particularly mentioned and expreſſed, and for divers other good cauſes and conſiderations, he the ſaid Merry Simpſon did grant, bargain, ſell, alien, releaſe, and confirm, unto the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, and their heirs, all that the manor or reputed manor of Barton Blount, and the capital manor or manſion-houſe called Barton Hall, with all and ſingular the out-houſes, park, lands, and hereditaments, thereunto belonging; and alſo all thoſe ſeveral meſſuages, farms, lands, and tenements, of him the ſaid Merry Simpſon in the ſaid indentures of leaſe and releaſe particularly mentioned and deſcribed; and alſo the perpetual advowſon or right of patronage to the church of Barton aforeſaid, with the appurtenances; to hold the ſaid premiſes, with the purtenances, unto the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, their heirs and aſſigns, to the only proper uſe and behoof of the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, their heirs and aſſigns; and it is thereby mentioned, that the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, for themſelves, their heirs and aſſigns, did covenant, promiſe, and agree, to and with the ſaid Merry Simpſon, his heirs, executors, adminiſtrators, and aſſigns, that they, the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, their heirs or aſſigns, or ſome or one of them, ſhould and would,

would, with all convenient ſpeed, well and truly pay, ſatisfy, and diſcharge, the ſaid ſeveral ſecurities, debts, or ſums of money, in the ſaid ſchedule mentioned, according to the true intent and meaning of the ſaid indenture of releaſe and the parties thereunto.

The ſaid Merry Simpſon, at the time of this purchaſe, was of the order of Mendicant Friars, in ſome monaſtery in France. The ſaid James Dormer, who was one of the ſchedule creditors of the ſaid Merry Simpſon for the ſum of 3138l. pretended to be due to him on bond from the ſaid Merry Simpſon, as well on the behalf of himſelf as on the behalf of ſuch other of the ſchedule creditors of the ſaid Merry Simpſon that remained unſatisfied, exhibited his bill of complaint in the high court of chancery againſt the ſaid Robert Freeman, Gervaſe Balguy, and Thomas Waterhouſe, and Merry Simpſon, and alſo againſt Iſaac Hawkins Brown and James Delanie, who were the aſſignees of two other of the ſchedule creditors by mortgage of the ſaid Merry Simpſon; and by the ſaid bill thereby praying (amongſt other things), that the ſaid Robert Freeman might pay to the ſaid plaintiff what ſhould appear to be due to him for the ſaid principal ſum of 3138l. and intereſt; or otherwiſe, that the ſaid manor and premiſes might be ſold, and that the ſaid Iſaac Hawkins Brown and James Delanie might join in ſuch ſale; and that ſuch of the defendants as had been in poſſeſſion of the ſaid eſtate and premiſes might account for the rents and profits thereof; and that the ſame, with the monies to be raiſed by ſale of the ſaid premiſes, might be applied in payment of the plaintiff James Dormer's ſchedule debt, and the intereſt due thereon. The cauſe was heard at the Rolls by conſent, and the ſame was entirely managed by the ſaid mr. Freeman on the behalf of the ſaid mr. Waterhouſe; and it was thereupon ordered and decreed, that it ſhould be referred to mr. Eld, one of the maſters of the ſaid court, to take an account of what was due to the defendants Iſaac Hawkins Brown and James Delanie for principal and intereſt on their mortgage, in the pleadings in the ſaid cauſe laſt mentioned, and to tax them their coſts of the ſaid ſuit; and likewiſe to take an account of what was due to the ſaid plaintiff James Dormer for principal and intereſt on his ſaid bond: and it was further ordered and decreed, that the ſaid manor lands and premiſes ſhould be ſold, with the approbation of the ſaid maſter, to the beſt purchaſer or purchaſers that could be got for the ſame, to be allowed of

by the ſaid maſter, wherein all proper parties were to join, as the ſaid maſter ſhould direct; and that the monies ariſing by ſuch ſale ſhould be applied, in the firſt place, in payment of what ſhould be found due to the ſaid defendants, Iſaac Hawkins Brown and James Delanie, for principal, intereſt, and coſts, on their mortgage; and in the next place, in payment of what ſhould be found due to the ſaid James Dormer for principal and intereſt on his ſaid bond: and in caſe there ſhould be any ſurplus of the money ariſing by the ſaid ſale, it was ordered and decreed, that the ſame ſhould be paid unto the ſaid Robert Freeman, he undertaking to keep down the intereſt on the ſeveral incumbrances on the ſaid eſtate until the ſame ſhould be ſold, purſuant to the ſaid order and decree. The ſaid maſter by his report certifies, that ſir Nathaniel Curzon was the beſt purchaſer, at the ſaid price and ſum of 11100l. This report is abſolutely confirmed. The ſaid maſter by his report certifies, that there was then due to the ſaid Iſaac Hawkins Brown and James Delanie, for principal and intereſt on their ſaid mortgage, the ſum of 2451l. 8s. 11d. and for their coſts 23l. 10s. 0d. making together 2474l. 18s. 11d.; and that there was due to the ſaid plaintiff James Dormer, for principal and intereſt on his ſaid bond, the ſum of 4338l. 13s. 10d. The ſaid Robert Freeman has ſince paid to the ſaid Iſaac Hawkins Brown and James Delanie the ſaid ſum of 2474l. 18s. 11d. ſo due to them as aforeſaid; and hath alſo, as the ſaid mr. Freeman alledges, paid off and diſcharged all the other debts of the ſaid Merry Simpſon, mentioned and compriſed in the ſaid ſchedule, ſave only and except the ſaid ſum of 4538l. 13s. 10d. ſo reported to be due to the ſaid James Dormer as aforeſaid, for principal and intereſt on his ſaid bond, which ſum is to be paid out of the ſaid 11100l.; and after payment thereof the ſaid Robert Freeman is, by virtue of the ſaid decree, entitled to the reſidue thereof. The ſaid Gervaſe Balguy is ſince dead, and Thomas Waterhouſe ſurvived him; but before ſir Nathaniel Curzon was reported the beſt purchaſer, Thomas Brown, the next proteſtant heir of Merry Simpſon, filed his bill againſt the ſaid Merry Simpſon, Robert Freeman, Thomas Waterhouſe, James Dormer, Iſaac Hawkins Brown, and James Delanie, ſetting forth the incapacity of Merry Simpſon to take, and of the conveyance to Freeman, Waterhouſe, and Balguy; and that he is a proteſtant, and next of kin as well to the ſaid Merry Simpſon as to John Merry Simpſon,

N. B.
13 Feb. 1750.
18 Feb. 1750.
29 Mar. 1751.

£.	s.	d.
2474	18	11
4338	13	10
6813	12	9

Simpſon, who died laſt ſeiſed: and charges, that the conveyance was in truſt for Merry Simpſon, and that they knew that Merry Simpſon was a papiſt; and charges, that the ſaid Freeman was a papiſt, and that Waterhouſe and Balguy's names were made uſe of to protect Freeman's intereſt; inſiſts, not to be bound by ſaid decree, in regard he was no party; and charges, that they are carrying the decree into execution as faſt as poſſible, and endeavouring to ſell the eſtate. Therefore the bill is for an account of the rents and profits; and if eſtate not ſold, to redeem what is unſold; and if eſtate be ſold, and the money applied in purſuance of ſuch decree, that the overplus money be paid to plaintiff; and to ſtay all proceedings on the ſaid decree till plaintiff has an opportunity of trying his title at law; and that the ſeveral mortgages may be ſet aſide without detriment to the ſame, ſo as not to prevent plaintiff's proceedings at law.

To this bill the ſaid Freeman has put in a plea, which in effect is ſetting forth the ſaid decree and report, whereby ſir Nathaniel Curzon is reported the beſt purchaſer; and in regard he is not made a party, relying upon that for plea.

And the ſaid Waterhouſe has put in a plea to the ſame effect.

The defendant Waterhouſe never was in poſſeſſion of the eſtate, nor received any rent, nor claims any right in it, but his name is made uſe of in truſt for ſaid Freeman; and he never executed the deed, nor knew any thing of it until ſome time after, when the ſaid Freeman acquainted him with it; and ſince this bill brought by the proteſtant heir, the ſaid Freeman earneſtly preſſes the ſaid mr. Waterhouſe to join with him to convey to ſaid ſir Nathaniel Curzon; which mr. Waterhouſe thinks may be dangerous, and will not do it without good advice.

By the ſtat. of 11 & 12 Will. 3. cap. all papiſts are diſabled to purchaſe, and all eſtates made for the uſe of ſuch perſons, or upon truſt for the benefit of ſuch perſons, ſhall be void. *Vide* 3 Geo. 1. c. 18. 11 Geo. 2. c. 11. and 11 Geo. 2. c. 17.

At the time of the purchaſe mr. Freeman was above eighteen years, and a papiſt; and Waterhouſe and Balguy had not nor ever claimed any thing in the lands but in truſt for him; ſo that in effect it is a purchaſe from a papiſt by a papiſt.

How the conveyance from Merry Simpſon can be good by 3 Geo. 1. cap. 18. not being made only for the benefit of proteſtants, though the deed be inrolled? 1. Quære.

The

The *Quære* therefore is, as mr. Waterhouſe has not yet conveyed the land to ſir Nathaniel Curzon, and as it is expreſsly charged by the bill brought by the proteſtant heir, that the defendants are endeavouring to carry Dormer's decree into execution as faſt as poſſible, Whether it will be prudent or adviſeable for mr. Waterhouſe to join in ſuch ſale, until he ſees what will be the event of the bill brought by the proteſtant heir? and if mr. Freeman gets the deeds approved by the maſter, and ſhall endeavour to compel him to join in the ſale before the preſent cauſe is determined, Whether it will not be adviſeable for mr. Waterhouſe to file a bill ſuggeſting theſe matters, and that he claims nothing in his own right, and is willing to act as the court ſhall direct; and to pray that Dormer's decree, ſo far as relates to the conveying of the ſaid eſtate, may not be carried into execution until the merits of the bill brought by the proteſtant heir be diſmiſſed or otherwiſe determined?

Anſwer. THOUGH mr. Waterhouſe has not yet conveyed, yet as there is a decree which directs him to convey, it will not be in the power of mr. Waterhouſe, I think, to ſuſpend the execution of this decree by an original bill; for the court does not eaſily ſtay proceedings upon a decree, unleſs the decree has been obtained by fraud or colluſion. —And unleſs mr. Waterhouſe can be indemnified, I would not adviſe him to engage ſo far in this diſpute as to file a bill in his own name, leſt ſuch ſuit may be attended with conſiderable expences to him.

2. Quære. Mr. Freeman is willing to indemnify mr. Waterhouſe, and mr. Waterhouſe is willing to execute the deeds, if he can with ſafety do it; but deſires your opinion, Whether, in caſe he executes the ſame, he can incur any other penalty or damage than the coſts and damages which may be incident to or occaſioned by the event of the ſuit? for as he has a real eſtate of his own, and is otherwiſe in good perſonal circumſtances, if any decree can be made againſt him to affect him or his lands, he will deſire to be excuſed from executing the deeds; though, as it is alledged, mr. Hawkins Brown and another termor for years of the eſtate in queſtion have aſſigned their mortgage terms

terms of years in truſt to attend the inheritance to be conveyed to ſir Nathaniel Curzon.

Note, Sir Nathaniel Curzon is no party to the ſuits; and poſſibly, as he purchaſes under the faith of a decree, notice may not be material to him; but *Quære.*

I HAVE looked into the bill brought by mr. Brown, the next proteſtant a-kin; and I think, that as the purchaſe is made, and the conveyances executed by all the parties but mr. Waterhouſe, that as to ſo much of the purchaſe-money as is applied in the payment of mr. Simpſon's juſt debts (and ſuch as are reported to be ſo, I think, muſt be ſo eſteemed) there is no pretence for the proteſtant next a-kin to affect it.—As to the overplus, that may admit of another conſideration; for that may poſſibly be held to be ſtill in the nature of real eſtate, and to be a reſulting truſt for the benefit of mr. Simpſon. If ſo, then the plaintiff may have ſome pretenſions to it; but I think, that his pretenſions can extend no farther, and if in fact the prayer of the bill extends no farther: for it is thus, "and in caſe the ſaid eſtate, &c. are now ſold, and the money appropriated in purſuance of ſuch decree in the payment of debts and mortgages, that then the overplus, if any remains, may be paid to the plaintiff, or laid out in lands," &c. And therefore, if mr. Freeman will give mr. Waterhouſe an indemnity to the amount of the value of 3500l.; that is, to anſwer the ſurplus, which is 3000l. and pay coſts and damages which he may be at in the defending of this ſuit; then I think, that mr. Waterhouſe may ſafely convey: and I think, that this would be the more ſecure and adviſeable method of conducting himſelf, than to engage any further in controverſies touching this eſtate. Anſwer.

Lincoln's Inn, R. WILBRAHAM.
July 16, 1751.

PART I.

PARTITION.

CASE.

G. B. being entitled to an undivided fourth ſhare in certain hereditaments, demiſes a moiety of his ſhare for one thouſand years by way of mortgage. A partition of theſe hereditaments was afterwards made, in which this term of one thouſand years was not noticed.—Mr. CAPPER'S OPINION, Whether the eſtate of the mortgagees for years was altered by the partition?

ELIZABETH Day, widow, John Baron, gent. Garrard Baron the elder, gent. and Garrard Baron the younger, gent. being each of them entitled to an undivided fourth part of certain freehold and copyhold meſſuages, lands, tenements, and hereditaments, in Great Everſden, Little Everſden, and Eltiſley, in Cambridgeſhire; the ſaid Garrard Baron the elder, 5th May 1743, by indenture made between him the ſaid Garrard Baron the elder, gent. of the one part, and William Brage, eſq. and George Andrews, gent. of the other part, did demiſe, grant, bargain, ſell, and to farm let, unto ſaid William Brage and George Andrews, one moiety or half part of all that his one undivided fourth part of and in all, &c. that meſſuage or tenement, &c. with the houſes, dovehouſes, outhouſes, barns, ſtables, buildings, yards, gardens, orchards, lands, arable and paſture thereunto belonging, containing by eſtimation one hundred and eighty-one acres more or leſs, lying and being in Eltiſley, in the occupation of Samuel Balduck; and alſo of and in all that meſſuage, cottage, or tenement, and the cloſe or parcel of ground, containing by eſtimation one acre, in the occupation of Peter Roſewell; and alſo of and in all that wood-ground and wood, containing by eſtimation four acres; and alſo of and in all that cloſe or parcel of land in the occupation of Richard Harper, containing by eſtimation one acre; and alſo of and in all that meſſuage or tenement, with the outhouſes, &c. and paſture lands thereunto belonging, containing by eſtimation fifteen acres, in the occupation of Stephen Hornſby; and alſo of and in all that cloſe of paſture, containing by eſtimation one acre and a half; and alſo of and in all that piece of paſture land, containing two acres; and alſo of and in all the wood-ground and wood, by eſtimation ſeven acres, with all woods, underwoods, &c. to the ſame reſpectively belonging, in Cambridgeſhire; and alſo of and in all and every the freehold tenements and hereditaments of him the ſaid Garrard Baron in the ſame county, and the reverſion and reverſions, remainder and remainders, eſtate, right, title, intereſt, uſe, truſt,

truſt, property, claim, and demand, whatſoever, both at law and in equity, of him the ſaid Garrard Baron to the ſame premiſes, to hold the ſaid undivided moiety or half-part unto the ſaid William Brage and George Andrews, their executors, adminiſtrators, and aſſigns, from the day of the date hereof, for one thouſand years, without impeachment of waſte, conditioned for the payment of 200l. with lawful intereſt, upon the 7th day of May 1744.

Note, The money advanced upon the above mortgage was money whereof the ſaid mr. Brage and mr. Andrews ſtood poſſeſſed in truſt for one mrs. Wyatt, who afterwards intermarried with one mr. Daniel Creagh, and is ſince dead.

Elizabeth, Day, widow, John Baron, gent. Garrard Baron the elder, and Garrard Baron the younger, gent. to Joſhua Day, gent. and John Godfrey, gent.

Indenture of partition, whereby ſaid Elizabeth Day, John Baron, Garrard Baron the elder, and Garrard Baron the younger, being unanimouſly minded to make equal partition of the ſaid lands, tenements, hereditaments, and premiſes, did covenant, promiſe, grant, and agree to and with the ſaid Joſhua Day and John Godfrey, in Michaelmas Term then next to levy a fine *ſur conuſance de droit come ceo, &c.* unto the ſaid Joſhua Day and John Godfrey, and the heirs of the ſaid Joſhua Day, of all that capital meſſuage or tenement and farm called Pond Farm, in the occupation of Samuel Balduck, with the houſes, &c. and one hundred and ſixty-four acres of arable land thereunto belonging, ſituate and being in the village of Eltiſley, in the county of Cambridge, in certain fields there called Eaſon Field, Middle Field, and Paply Field; and alſo of a cloſe of paſture called Hay Cloſe, containing by eſtimation ſix acres; and alſo of a cloſe of paſture called Buſh Cloſe, containing by eſtimation three acres; and alſo of a cloſe of paſture called Long Cloſe, containing by eſtimation three acres; and alſo of a cloſe of paſture called Dove Cloſe, containing by eſtimation three acres; and alſo of a cloſe of paſture called Town Croft, containing by eſtimation three acres; and alſo of a cloſe of paſture called Keen's Cloſe, containing by eſtimation one acre; and right of commonage for two hundred ſheep; and alſo of a cottage in the occupation of Peter Roſewell, and a cloſe of paſture thereunto belonging, and

20 Sept. 1753.

and four acres of woodland, all in Eltiſley; and alſo of a meſſuage or tenement and farm in the occupation of Stephen Hornſby, with the houſes, outhouſes, &c.; and of two cloſes of paſture called Tafting's Cloſe and Peck's Cloſe, containing by eſtimation ſeven acres and a half; and alſo of a cloſe of paſture called Baron's Cloſe and Hop Ground Cloſe, and four pightells, containing ſeven acres and a half, in Little Everſden; the uſes of which ſaid fine, as to, for, and concerning, the ſaid capital meſſuage or tenement and farm called Pond Farm, in the occupation of Samuel Balduck, with the houſes, &c. and one hundred and thirty-ſix acres of arable land thereunto belonging, and the ſaid ſix cloſes of paſture called Hay Cloſe, Buſh Cloſe, Long Cloſe, Dove Cloſe, Town's Croft, and Keen's Cloſe, and right of commonage and foldage for one hundred and ſeventy-two ſheep, are therein and thereby declared to be and enure to the only uſe and behoof of the ſaid Garrard Baron the elder, his heirs and aſſigns for ever.

Fine levied accordingly, and partition executed by all the parties.

Oct. 1753. Obſerve, the will was made before the eſtate was divided.

The ſaid Garrard Baron the elder died ſometime in the month of October 1753, having firſt duly made and publiſhed his laſt will and teſtament in writing, bearing date the 24th October 1751; whereby he did give, deviſe, and appoint, unto his ſon Charles Baron, his heirs and aſſigns for ever, all that his the ſaid teſtator's moiety of his one-fourth part of the eſtate in Cambridgeſhire, late the eſtate of mrs. Eſther Baron, which he had mortgaged to William Brage, eſq. and mr. George Andrews, and all his lands, tenements, and hereditaments, both freehold and copyhold, or of what nature or kind ſoever, in the county of Cambridge; and all and every his part, ſhare, and purparty, of, in, or to, any lands, tenements, or hereditaments whatſoever, in the ſaid county of Cambridge (except the other moiety of his one-fourth part of the ſaid eſtate, late the eſtate of the ſaid Eſther Baron, whereof he made a ſettlement on the marriage of the ſaid Charles Baron), ſubject to the payment of the principal money which ſhould be due at the time of his deceaſe on the mortgage aforeſaid; and alſo ſubject to and chargeable with the payment of 220l. unto his ſon Garrard Baron, his executors or adminiſtrators, at the end of one year after his deceaſe.

Said

Said Garrard Baron the legatee } Indenture, whereby 24 May, 1754.
to } the ſaid Garrard Baron
Said Charles Baron the deviſee. } (after reciting the will of Garrard Baron his father), in conſideration of 220l. remiſed, releaſed, and for ever quit-claimed, unto ſaid Charles Baron, his heirs, executors, adminiſtrators, and aſſigns, as well the ſaid ſum of 220l. ſo charged on the ſaid eſtate and premiſes by the ſaid will, as alſo all and all manner of action and actions, &c. touching or concerning the ſame.

Said Charles Baron } Indenture, whereby ſaid Charles 25 May, 1754.
to } Baron, in conſideration of 200l. to
Richard Randall. } him paid by ſaid Richard Randall, did demiſe, grant, bargain and ſell, all that his the ſaid Charles Baron's undivided moiety or half-part of and in all that the ſaid capital meſſuage, tenement, or farm, called Pond Farm, with the houſes, &c. and one hundred and thirty-ſix acres of land thereunto belonging, and the ſaid ſix cloſes of paſture, and right of commonage and foldage for one hundred and ſeventy-two ſheep, which he the ſaid Charles Baron claimed under the will of his late father Garrard Baron deceaſed, and all and every the meſſuages, lands, tenements, and hereditaments, and moieties, parts, ſhares, and purparts, of meſſuages, lands, tenements, and hereditaments whatſoever, of him the ſaid Charles Baron, ſituate, lying and being in the county of Cambridge, to hold the ſaid undivided moiety or half-part unto the ſaid Richard Randall, his executors, adminiſtrators, and aſſigns, from the day next before the day of the date hereof, for one thouſand years, without impeachment of waſte, conditioned for the payment of 204l. on the 25th day of November then next.

Charles Baron mortgages the whole eſtate conveyed to his father upon the partition, without taking any notice of the prior mortgage made by his father previous to the partition.

It ſeems to compriſe only the moiety of the one fourth allotted in ſeveralty to his father; the other moiety not being claimed under the will, but by ſettlement.

Sir Richard Randall } Deed-poll, by way 27 Dec. 1754.
to } of aſſignment, duly
Garrard Baron and John Baron. } ſtamped and executed, by indorſement on the back of the above in part recited mortgage, whereby ſaid Richard Randall, in conſideration of 200l. paid, or ſecured to be paid, by ſaid Garrard Baron and John Baron (at the requeſt and by the direction of ſaid Charles Baron) did bargain, ſell, aſſign, transfer, and ſet over, unto the ſaid Garrard Baron and John Baron the ſaid undivided moiety or half-part of and in the ſaid meſſuage, tene-

tenement, or farm, lands, cloſes, and premiſes, to hold unto the ſaid Garrard Baron and John Baron, their executors, adminiſtrators, and aſſigns, for the remainder of the term of one hundred years.

This aſſignment is executed by ſaid Richard Randall and Charles Baron.

2 Feb. 1757. The ſaid Charles Baron is ſince dead, having duly made and publiſhed his will of this date, whereby he gave and deviſed his undivided moiety or half-part of and in all the ſaid premiſes unto Amy Baron his wife, and her aſſigns, for and during the term of her natural life; and from and immediately after her deceaſe, he gave and deviſed his ſaid undivided moiety or half-part and premiſes to be equally divided, ſhare and ſhare alike, amongſt ſuch and ſuch children as ſhould be alive after the deceaſe of his ſaid wife Amy Baron.

Note, The youngeſt of the ſaid children is not above a year old.

6 July, 1757. This day ſaid mrs. Amy Baron, the widow and executrix of ſaid Charles Baron, paid the ſaid Garrard Baron and John Baron the principal and intereſt due on their mortgage, who did then undertake in writing to aſſign over the ſaid mortgage unto her, or whom ſhe ſhould appoint, which has not yet been done.

The mortgage made to the ſaid mr. Brage and mr. Andrews ſtill remains a charge upon the ſaid eſtate; and mr. Daniel Creagh, the huſband and adminiſtrator to his late wife (formerly Wyatt), threatens to bring an ejectment by the ſurviving truſtee, mr. Andrews, and take poſſeſſion of ſo much of the ſaid eſtate as was conveyed to Garrard Baron deceaſed upon the partition, being part of the freehold eſtate compriſed in the firſt mortgage of a moiety of an undivided fourth part of the whole eſtate.

Mrs. Baron, the tenant for life, has a friend who would advance the money due on the ſaid mortgage made to mr. Brage and mr. Andrews, and alſo the principal and intereſt money which was due on the mortgage made to mr. Randall, which was paid by mrs. Baron, if it is apprehended the ſaid mr. Andrews can legally aſſign ſo much of the eſtate compriſed in the firſt mortgage as was conveyed to Garrard Baron by the deed of 20th Sept. 1753, and the ſaid Garrard Baron and John Baron can transfer the mortgage made by ſaid Charles Baron to ſaid Richard Randall, which was afterwards aſſigned to them, to ſuch perſon who will advance the money; and that ſuch eſtate

will

will be chargeable with the money ſo advanced, and the growing intereſt thereof. All parties intereſted are willing to join in the aſſignments.

Whether mr. George Andrews, the ſurviving truſtee of the firſt mortgage, with the conſent of mr. Daniel Creagh, the huſband and adminiſtrator to his late wife, can legally aſſign ſo much of the eſtate as was conveyed to the ſaid Garrard Baron deceaſed in fee ſimple upon the partition in 1753, being only part of the eſtate compriſed in the firſt mortgage? and, Whether the ſaid Garrard Baron and John Baron may transfer the mortgage which was aſſigned to them by the ſaid Richard Randall, ſubject to the payment of the principal and intereſt monies due on the ſaid reſpective mortgages, to any perſon who will advance the ſame? and, Whether the ſaid freehold eſtate will be chargeable with the money ſo advanced, and teſtator's widow be obliged to pay the growing intereſt of the ſame during her life? and if mr. Capper ſhould think both the ſaid mortgages may be aſſigned, Whether it will be moſt adviſeable to aſſign them diſtinctly, or recite and transfer them both in one deed, as they will be made to the ſame perſon? and, Whether it will not be proper to make mrs. Baron (the termor for life) a party, and for her to convenant, that the heirs, executors, adminiſtrators, or aſſigns, of Charles Baron her late huſband ſhall pay the principal and intereſt money? or, What other ſteps will be neceſſary to take to make a mortgagee ſafe in taking ſuch mortgages, in caſe they can be aſſigned? Quære.

I APPREHEND, that as mr. Brage and mr. Andrews were not parties in the deed of partition and fine levied in Michaelmas 1753, and as the uſes of ſuch fine of the premiſes allotted in ſeveralty to Garrard Baron in ſeveralty were not declared to them for one thouſand years, redeemable by Garrard Baron the elder, and ſubject thereto to him and his heirs, ſo that they might have ſurrendered up the firſt mortgage term, that their eſtate in the premiſes were not altered by ſuch deed of partition and fine; and that the firſt term of one thouſand years of a moiety of an undivided fourth in the whole is become veſted in mr. George Andrews, the ſurviving truſtee, for mr. Anſwer.

mr. Creagh, the adminiſtrator of his late wife, formerly mrs. Wyatt. But as mr. Charles Baron in May 1754 demiſed a moiety of the premiſes (allotted in ſeveralty) to mr. Randall, by way of mortgage, for one thouſand years, and which became veſted afterwards in Garrard Baron and John Baron, I apprehend, a mortgagee will be ſafe in taking the aſſignment of that mortgage from them by the directions of mrs. Amy Baron, who ſhould be a party to the aſſignment; and that ſuch mortgagee will be ſafe in taking the aſſignment of the other mortgage from mr. George Andrews by the directions of mr. Creagh and mrs. Amy Baron; and theſe aſſignments ſhould be by two different deeds, ſubject to one redemption, *viz.* by payment of the money mentioned, as the conſideration of one aſſignment, and alſo of the money mentioned in the other aſſignment, bearing even date therewith; and that the intereſt in arrear ſhould not be made a part of the conſideration of ſuch aſſignment.—And I apprehend, mr. George Andrews may ſafely aſſign by ſuch directions as aforeſaid; and that the ſaid Garrard Baron and John Baron may alſo aſſign ſafely under ſuch directions; and that mrs. Amy Baron ſhould covenant to keep down for her life the intereſt of the mortgage money.

Lincoln's Inn, FRANCIS CAPPER.
September 17, 1757.

PATENT.

Case. 11 April, 1726. 2 Geo. 2. The Corporation of Newcaſtle upon Tyne, preſcribing to be conſervators of the water and haven of that river, and having immemorially erected wharfs for receiving ballaſt caſt out of the ſhips lying there, one Lyddell obtains a patent for the ſole privilege of uſing a veſſel or machine, by means of which he carries the ballaſt from ſhips lying in the Tyne into the ſea, and unlades it in fourteen fathom of water.—The ſeveral Opinions of Mr. Murray and Mr. H. Campbell upon an excluſive claim made by the Corporation to unlade ballaſt from ſhips lying in the Tyne upon the wharfs erected by them for that purpoſe.

HIS Majeſty, by letters patent of this date (reciting, that Richard Lyddell, late of the town and county of Newcaſtle upon Tyne, maſter and mariner, had invented a new ſort of machine or veſſel for the removal of or carrying away earth, ballaſt, ſand, rubbiſh, rocks, ſtones, or any other kind of matter that might be a nuiſance to any port, river, harbour, creek, or inlet, in any of his majeſty's dominions, which would be of great benefit and advantage to the kingdom in general, rendering ſuch ports, harbours, or places, more commodious and ſecure for the navigation in general of the kingdom, and anſwer the ends thereby deſigned more effectually than any machine heretofore made uſe of for the purpoſes), granted to the ſaid Richard Lyddell, his executors, adminiſtrators, and aſſigns, the ſole privilege to make, uſe, exerciſe, and vend the ſaid invention within England, Wales, and Berwick upon Tweed, for the term of fourteen years; provided, that if the ſaid grant ſhould appear to be contrary to law, or prejudicial or inconvenient to the ſubject in general, the ſaid patent to be void. The king alſo grants, that the ſaid letters patent ſhall be taken, conſtrued, and adjudged, in the moſt favourable and beneficial ſenſe for the ſaid Richard Lyddell, as well in all his courts as elſewhere, notwithſtanding the not full and certain deſcribing the nature or quality of the ſaid invention, or of the materials thereto conducing or belonging.

Purſuant to this patent, Mr. Lyddell has built ſeveral veſſels according to his plan, which are about the burthen of 30 ton, and carried them into the river Tyne, and Newcaſtle, and there unloads ballaſt from the coal-ſhips in that river (thoſe ſhips being obliged every voyage to carry 60 or 80 ton of ballaſt from London, having no other loading), by caſting it out of the ſhips into the machine, and then proceeds with it down the river to the ſea, where he empties the ballaſt out at the bottom of the machine in not leſs than fourteen fathom water, and thereby frees the river from the hazard of being choaked up by any ballaſt falling or being caſt up into the harbour.

Againſt

Againſt this method of emptying ballaſt, the Corporation of Newcaſtle have ſeveral objections, and claim the following right, *viz.*

1. That the ſaid town of Newcaſtle is an ancient borough by preſcription.

2. And they claim, by ſuch preſcription, to be conſervators of the water and haven of Tyne, and are liable to cleanſe, ſcour, preſerve, and keep the ſame a ſafe ſtation or harbour for ſhips; and that they had immemorially and ſtillcontinue, from time to time, to lay out large ſums of money in cleanſing and preſerving the ſaid river and haven.

3. That the Corporation have immemorially erected wharfs for receiving ballaſt, &c. caſt out of ſhips being in the ſaid haven, and applying to the ſame; and have maintained thoſe wharfs, and made other new wharfs, at their own coſts, and on their own ground (as the water, or the ground, or the bottom thereof, covered with the flowing of the ſea, and being within flood-mark, from Sparrowhawk to Hedwin ſtreams, have been and are parcel of a fee-farm granted to the ſaid town, at the rent of 100l. *per annum*); and when the ballaſt caſt on the ſaid wharfs falls down from the ſame, or is waſhed by the water into the entrance or mouth of the ſaid river, or falls from ſhips or lighters in unloading, the Corporation, at their own coſts, have from time to time removed the ſame.

That a court of record is held by the mayor and others, in which they inquire, by a jury of the town, concerning all abuſes committed within the haven, and determine of them, and puniſh offenders by fine and impriſonment; and for the better conſervancy of the haven, the ſaid court make ſtatutes, ordinances, and decrees, as often as needful, and puniſh offenders by fine and impriſonment: and the ſaid court have by their precept, and for the profit of the Corporation, levied theſe fines, and on non-payment have diſtrained for the ſame.

The above objections are an extract of a plea put in by the Corporation to a *Quo Warranto* brought againſt them in Term, 4 Car. 1.; on which plea, Michaelmas 5th ſame king, judgment was entered for allowing all the liberties, privileges, franchiſes, and free cuſtoms, claimed by them in their ſaid plea. But if this be true, it might have been done by colluſion.

In or about the year 1635, a great fire happened at Newcaſtle, by which moſt of the records belonging to the

the town was burnt; but from the year 1649 down to the preſent time, there are books in which the proceedings at the courts above mentioned, held for the conſervancy of the river, are entered; and there are in thoſe books ſeveral entries of fines impoſed upon maſters of ſhips for caſting ballaſt into the river, and ſome for caſting their ballaſt into other veſſels in the river; and moſt of thoſe fines appear from the entries in the ſaid books to have been paid; but it does not appear that any diſtreſſes were made for the fines, but that the perſons ſo fined ſubmitted and paid.

By an act of parliament made in the 21 Hen. 8. cap. 16. not printed in the Statutes at Large, but printed at large in an edition of the ſtatutes from *Magna Charta* to the end of the reign of Philip and Mary, and printed in 1618, the mayor, and burgeſſes, and commonalty, have power to pull down all weirs, &c. In the preamble of that act, the right of the ſaid mayor and burgeſſes to the conſervancy of the river Tyne, and to the ſoil of that river covered with water, is ſet forth very fully.

Many of the coal ſhips being enlarged to great burthens, and being ſo large could not poſſibly come within a mile of the town, and ſo could not caſt their ballaſt at the keys there; therefore, for their convenience, the corporation hath, from time to time erected, or allowed to be erected, keys for the reception of ballaſt at a great diſtance from the town, even down to Shields, nigh the mouth of the river, which is ſeven miles from Newcaſtle; and maſters of ſhips pay for caſting their ballaſt upon the keys or ſhores lying between Newcaſtle and Shields; ſome of which keys or ſhores are in the hands of leſſees under the Corporation; others are built or erected by licence from the Corporation; and others are in the hands of the Corporation themſelves. For the ballaſt caſt upon the keys in the hands of the Corporation, the whole ſum paid by the maſters is retained by the Corporation, becauſe they are at the expence of conveying ſuch ballaſt from the face of the key; but where it is caſt upon the keys held by leaſe, or erected by licence, the poſſeſſors of ſuch keys are at the charge of conveying ſuch ballaſt from the face of ſuch keys, and are paid by the Corporation for ſo doing, purſuant to covenant in their leaſes or agreements.

Maſters may elect to caſt their ballaſt on any of the above keys, and may go up to ſeveral of them with their ſhips; but when they do not chuſe to go with their ſhips

to caſt their ballaſt upon any of the above keys, they caſt it into keels, which is a kind of lighters.

For liberty to receive the ballaſt into ſuch keels, a ticket or order, commonly called a warrant, is given by the water-bailiff to the ſkipper or maſter of the keel, expreſſing the quantity of ballaſt to be taken on-board ſuch keel, and on what key the ſame is to be caſt; which warrant is delivered to the perſon who attends at the key to receive it; and by ſuch warrant he can know with certainty whether the quantity of ballaſt caſt out of the ſhip into the keel is brought to the key; and this method has been taken to know whether any of the ballaſt has been thrown overboard into the river by the keelmen. And for the better preſerving ballaſt from being caſt overboard, the water-bailiff alſo, as ſoon as any keel is loaden with any quantity of ballaſt, puts a man on board every ſuch keel, with direction to continue in the ſame until ſuch keel come to the key where the ballaſt is to be caſt; and then, before any ballaſt is caſt, to deliver the ſaid ticket or warrant ſigned by him to the conveyer of the ballaſt at ſuch key, and alſo to ſtay there till the ballaſt is caſt and turned back a full yard from the face or edge of the key: for which warrant, and the man's trouble, four ſhillings is paid to the water-bailiff by the maſter of the ſhip; and the maſter of the ſhip pays alſo 12s. 4d. to the ſkipper and keelmen, for the uſe of their keel and labour.

The reaſons which the Corporation give for taking a greater ſum *per* ton at ſome of the keys than others (which they do take) are, that at thoſe keys where the greater ſums are taken, either the ballaſt is to be conveyed to a greater diſtance from the face of the ſhip; and in proportion to ſuch diſtance the Corporation pay or allow to their conveyers, or the poſſeſſors of the key, towards their charges and expences in getting the ſame conveyed; or that ſuch keys being nigh to the mouth of the river, the Corporation is at a greater expence in removing ſuch part of the ballaſt as happens to fall into the river from the keys; and that greater expence is occaſioned by the flux of the tide being ſtronger and quicker there than at the mouth of the river.

The Corporation alledge, that the above payments all along ſince the reſpective erections of the keys (many of which have been newly erected within a very few years) have been made by all maſters of ſhips reſorting to the port of Newcaſtle, for all the ballaſt brought by them into the river, till the ſaid Richard Lyddell brought this machine

or

of veſſel there, by means of which the Corporation are in danger of loſing a conſiderable part of their income, and by that means will be leſs able to cleanſe the ſaid port from nuiſances as they ought to do, in caſe they cannot put a ſtop to mr. Lyddell's proceedings.

In purſuance of an order made at the river court before mentioned, the river jury have taken a view of the ſaid Rich. Lyddell's veſſel or machine, and have preſented on their oaths, that the caſting of ballaſt out of ſhips into the ſaid veſſel is a nuiſance to the ſaid river; and that the ſaid veſſel is ſo contrived, that the ſhutters, or trap hatches, by which the ballaſt is let out again from the ſaid veſſel, cannot poſſibly be ſhut ſo cloſe but by the working and waſhing of the water which communicates with the ballaſt in the ſaid veſſel, a quantity of the ſaid ballaſt muſt and will fall into the river, even while the ſaid veſſel lies at anchor, but eſpecially when under ſail; and that the trap hatches being made with hinges, for the conveniency of opening and ſhutting, ſome little ſtones, or part of the ballaſt caſt into the ſaid veſſel, muſt lodge in the joints of the ſaid ſhutters or trap hatche s, and prevent the ſame from being ſhut up cloſe; and upon ſuch lodging of little ſtones, or parts of ballaſt in the ſaid joints, great quantities of the ſaid ballaſt caſt into the ſaid veſſels do and will drop or fall into the ſaid river; and that in the hold of the ſaid veſſel there are ſcupper holes, through which quantities of the ballaſt caſt into the ſaid veſſel muſt, in the working of the ſaid veſſel, paſs and fall into the ſaid river.

N. B. This jury was compoſed of the very inferior ſort of people of the town, ſuch as gaolers, butchers, &c. who never had ſeen the ſaid veſſel's bottom, or could poſſibly know any thing thereof; and ſome of them were greatly diſſatisfied with their verdict, and refuſed to ſign it.

Mr. Lyddell in anſwer to theſe objections inſiſts, That the Corporation have no excluſive privilege or right of unloading the ſhips of their ballaſt, but it is merely at the election of the maſters to caſt their ballaſt at thoſe ſhores, or in any other manner, ſo as they do not caſt it into the river; and that it is the daily practice of maſters to caſt their ballaſt in fourteen fathoms water at ſea, before they go into the harbour, and often to bring part of it back out of the harbour, on board their ſhips, or in their own boats, and caſt it at ſea, rather than be at the expence, or wait for the keels to take it away; and ſome time ago there were a great number of people who made it their ſole buſi-

neſs for many years to carry ballaſt, for their own gain from the ſhips in the river of Tyne, and caſt it at ſea in fourteen fathom water, and never were impeded by the Corporation.

To put a ſtop to mr. Lyddell's ingenious invention, which has been found of great convenience and benefit to the maſters of ſhips, the Corporation hath cauſed ſeveral actions to be brought againſt ſuch maſters as have employed this machine, upon a clauſe in an act of 34 and 35 Hen. 8. cap. 9. ſ. 6. the iſſues in which are exactly the ſame, and a copy of one of them is as follows:—

"Northumberland, to wit. { JOHN FOSTER, who ſues as well for our ſovereign "lord the king as for himſelf in this behalf, complains of "William Clarke, being in the cuſtody of the marſhal of "the marſhalſea of our ſovereign lord the king, before the "king, himſelf of a plea, that he render to our ſaid lord "the king, and the ſaid John, who as well, &c. 10l. which "he owes to our ſaid lord the king: and the ſaid John who "ſues as aforeſaid, and unjuſtly detains for this (to wit), "that the ſaid William, after the 1ſt day of Auguſt, in the "36th year of the reign of the late king Henry the 8th "(to wit), on the 6th day of March in the year of our "Lord 1754, at North Shields, in the county aforeſaid, did "caſt and unlade out of a certain ſhip called the Globe, "then and there being within the river Tyne, flowing "and running to the port town of Newcaſtle upon Tyne, "within this realm, and within the haven and port of "Newcaſtle upon Tyne aforeſaid, eighteen ton of ballaſt "below the full ſea mark, and not upon the land above "the full ſea mark, contrary to the form of the ſtatute in "ſuch caſe made and provided; whereby, and by force of "the ſaid ſtatute, an action accrued to the ſaid John who "ſues as aforeſaid, to demand and have of the ſaid Wil-"liam 5l. parcel of the ſaid 10l. And the ſaid John who "ſues as aforeſaid further ſaith, that the ſaid William after-"wards, at another time (to wit), on the 13th day of "March in the ſaid year of our Lord 1754, at North "Shields aforeſaid, in the county aforeſaid, did caſt and "unlade out of a certain other ſhip called the Globe, then "and there being within the ſaid river Tyne, flowing and "running to the port town of Newcaſtle upon Tyne with-"in this realm, and within the port and haven aforeſaid "of Newcaſtle upon Tyne aforeſaid, five ton of ballaſt

"other-

" otherwiſe than upon the land above the full ſea mark,
" contrary to the form of the ſtatute in ſuch caſe made and
" provided; whereby, and by force of the ſtatute, an ac-
" tion accrued to the ſaid John who ſues as aforeſaid, to
" demand and have of the ſaid William other 5l. reſidue
" of the ſaid 10l. Yet the ſaid William (although often
" requeſted) hath not paid the ſaid 10l. or any part thereof,
" to the ſaid lord the king, and the ſaid John who ſues as
" aforeſaid; but to pay them the ſame the ſaid William
" hath hitherto wholly denied, and ſtill doth deny. Where-
" upon the ſaid John who ſues as aforeſaid ſays, that he is
" injured, and hath damage to the value of 5l.; and there-
" fore, as well for the ſaid lord the king as for himſelf, he
" brings ſuit, &c."

To which the defendants have pleaded the general iſſue; but theſe actions, it is apprehended, they will drop, and proceed no further therein.

There are upwards of five hundred ſail of ſhips belonging to the port of Newcaſtle, and perhaps not five of them that ever complied, or ever could comply, with the letter of this act, *viz.* to caſt their ballaſt only upon the land above the full ſea mark; for it is now become impoſſible for thoſe ſhips to get up to the ballaſt keys for want of water, and therefore they have been hitherto obliged to caſt into keels as aforeſaid, and thoſe keels carry the ballaſt to the keys, where it is laid in great heaps, and often falls from thoſe heaps into the river in great quantities, it ſoon becoming dry in the heaps, and then is blown into the water by the wind. Beſides, in carrying the ballaſt from the ſhips to the keys, nothing is more common than for the keelmen to caſt it into the river all the way they go, even in the preſence of the perſon put on board by the water-bailiff to prevent the ballaſt from being thrown out of ſuch keels; for within theſe fourteen years laſt paſt the river has been ſo choaked up by theſe means, that where a large ſhip might then go, a ſmall boat cannot now go.

All that the maſters have done in breach of the above act to occaſion thoſe actions, is only caſting their ballaſt into mr. Lyddell's machine (inſtead of the keels), which carries it out to ſea inſtead of laying it upon the land; and therefore it is apprehended, they are no more puniſhable for ſo doing by virtue of this clauſe, than they have been every voyage for many years paſt in caſting it into the keels;

keels; between which keels and mr. Lyddell's veſſel (with reſpect to the maſters) it is apprehended there is no difference; and that if there is any offence committed, it is by mr. Lyddell's veſſel in not laying it upon the land, as the keels do.

It is alſo apprehended, that mr. Lyddell's method of unloading ballaſt by this machine, although it may be within the ſtrict letter and deſcription of the above act, yet it is not within the miſchief intended to be remedied by the ſame, viz. caſting ballaſt immediately from the ſhip into the river, and thereby choaking and filling it up: for notwithſtanding the opinion of the river jury, this machine is ſo contrived, that not the leaſt part of the ballaſt can poſſibly fall out into the river; for the ſhutters and trap hatches ſhut ſo very cloſe, that neither by the working or waſhing of the water can any part of the ballaſt poſſibly fall out; and this can be proved by the maſters of the Trinity-houſe at London, who have ſurveyed the ſaid veſſel: nor can any fall down into the river between the ſhip and the veſſel in caſting of it, which is very frequent with the keels; and therefore it is beyond diſpute, that this invention is not the leaſt detriment to the river, but a very great benefit to it in particular, and to the whole coal trade in general, by unloading the ſhips quicker, and at a ſmaller expence: and this ſtatute ſeems to give leave by implication for maſters to unload as they pleaſe, complying therewith; which may carry ſome force againſt any preſcription in the Corporation; and this will appear further by a ſtatute to near the ſame effect made 19 Geo. 2. It may be worth obſervation, that this act never was nor ever can be complied with in the river Thames, whither the ſhips from all parts bring large quantities of ballaſt, for there is no land upon the Thames whereon to lay the ballaſt; but the method is, to caſt it into lighters belonging to the Trinity-houſe at London, and for them to caſt it into light ſhips (the colliers moſt commonly), or to diſpoſe of it in any way the maſter of the ſhip pleaſes, only keeping it out of the river; but they never lay it upon the land; and very often an owner of ſeveral ſhips will caſt the ballaſt out of one into another of his own ſhips, without any permiſſion or directions from the maſter of the Trinity-houſe.

1. Quære. Whether the plaintiff can prevail in theſe actions againſt the maſters?

I THINK

I THINK the Caſe above ſtated not within the mean- Anſwer.
ing or miſchief intended to be remedied by the ſaid act; and therefore am of opinion, the plaintiff cannot prevail in theſe actions againſt the maſters.

Will the right of the town to unlade ballaſt, or mr. 2. Quære.
Lyddell's patent, come into queſtion on the trial of the aforeſaid actions? and upon the whole, What evidence will be neceſſary or proper to be given, both by the plaintiff and defendant? and pleaſe to ſtate the ſame particularly, as we may, from a thorough knowledge of this, be better able to take the advantage of a nonſuit.

I THINK, neither the right of the town to unlade bal- Anſwer.
laſt, or mr. Lyddell's patent, can come in queſtion upon the trial of the ſaid actions; the plaintiff could only ſhew, that the ballaſt was unloaded, but not upon land above the ſea-water mark: the defence would be, that the act is penal, and meant to prohibit the throwing it into the river, which is better prevented by the method complained of than by putting it upon land, &c.

Whether the Corporation can diſtrain, or in their court 3. Quære.
of conſervancy fine or impriſon, for any fees or dues for unloading ballaſt, either alone or jointly with any other dues, or otherwiſe, where the ſaid machine has unloaded the ſame ballaſt? or, Can the Corporation bring any actions, and againſt whom, for any of theſe pretended dues for unloading ballaſt, when unloaded by the ſaid machine?

I THINK, the Corporation, in their court of conſer- Anſwer.
vancy, may fine and impriſon for unlading ballaſt after the ſhip is come within their juriſdiction. I think, they may bring actions for their dues; and am of opinion, from the above ſtate, that the Corporation has an excluſive ſuperintendance of unlading ballaſt from ſhips which are within the river Tyne: and there may be good reaſon for it; and this method may be well calculated to carry the ballaſt out into the ſea; but unleſs it be done under the

authority

authority of proper officers, there is no ſecurity but it may not be thrown into the river.

4. Quære. Whether this pretended excluſive right of the Corporation to unlade ſhips, being a monopoly, and a heavy burthen of expence to the owners of ſhips uſing the ſaid port, the Corporation, or any others to be ſet up by them, can prevail in any other action, ſuit, or proſecution, in law or equity, to be brought concerning the ſaid machine or patent? Againſt whom, and in what manner, may they proceed to do the ſame?

Anſwer, IF the right be clear, I think, no objection can ariſe from its being a monopoly, or a charge upon trade, becauſe it may have had a reaſonable commencement, and may be beneficial, the Corporation being obliged to cleanſe and preſerve the river from being choaked.

Auguſt 9, 1754. *W. M.*

Mr. HUME's OPINION upon the ſame Caſe, Anſwer to Firſt Quære. AS the facts are ſtated in this Caſe, I think, the plaintiff cannot recover in theſe actions, although the ſtatutes of Hen. 8, and Geo. 2. are worded very generally.

Anſwer to Second Quære. I THINK, in theſe actions the town's rights or the patent cannot come properly in queſtion. What evidence will be neceſſary on each ſide, is too much for me to ſay. I think, if the defendant can prove the ballaſt put on board his veſſel to be carried out of the port, haven, or river, and actually ſo done, he will prove his caſe.

Anſwer to Third Quære. THE Corporation may diſtrain, &c. provided they bring the caſe within their legal power; but what will amount to that I cannot ſpecify, without the Corporation was to ſpecify their right, and the conſideration on which that right is founded; and as they may perhaps legally ſupport a diſtreſs, ſo they may maintain an action.

THE

Answer to Fourth Quære.

THE queſtion is too general, and the Caſe of the Corporation not explicit enough. The Corporation may, in conſideration of the expence of cleaning the river and repairing the keys, exclude all perſons from unlading ballaſt in the river, and have a remedy adapted to that right; the queſtion will then not be on the patent, or on the nature of the machine (ſuppoſing it does not ſhed any of the ballaſt in the carriage), but upon the unlading in any machine at all: it will be difficult to ſupport ſuch a right; but I cannot ſay it is impracticable. When the Corporation ſets out the ſpecial right claimed, a judgment may be formed upon it; at preſent it is too vague.

Auguſt 26, 1754. A. HUME CAMPBELL.

POWERS.

POWERS.

CASE I.
21 and 22 July, 1714.

By a marriage settlement, the intended wife was authorised, with the consent of her two trustees in writing, to dispose of such of her estates as should remain unapplied for the purposes therein mentioned; and in default of such disposition, the estate was limited in strict settlement. Afterwards the wife appoints the lands in trust for the payment of her husband's debts; first by a deed executed by only one of the trustees; and again by a second deed, executed by the other trustee only.—Mr. LUTWYCHE's OPINION, Whether a purchaser under a decree for sale, under these trusts, would be protected against the limitation over?

BY lease and release, *countess-dowager of Anglesey* (after reciting that the estate was liable to several charges and incumbrances, and that a marriage was intended between her and lord Ashburnham, and that 20,000l. *was to be raised out of the same for her portion to pay lord Ashburnham's debts*), in consideration of her said intended marriage, and of one shilling, releases *(inter alia)* the manor of *L.* to trustees, and their heirs, upon trust,

To raise monies sufficient to pay those charges *and the said* 20,000l.; and then, after a direction that the surplus-money shall be laid out in lands, and settled as therein is appointed, comes a proviso to this effect:—

Provided also, that all the estate by the said indenture of release vested in the said trustees and their heirs as aforesaid, which shall remain unsold and undisposed of after all and every the trusts therein before declared concerning the same shall be fully performed, shall be by the said trustees, and their heirs, conveyed and assured to such person and persons, and for such uses, estates, intents, and purposes, as the said *countess-dowager of Anglesey*, whether covert or sole (notwithstanding her said intended coverture), by and with the consent of James duke of Ormond and Charles earl of Arran, or the survivor of them, testified in writing under their hands and seals, in the presence of two or more credible witnesses, shall by any deed or deeds, writing or writings, to be by her duly sealed and delivered in the presence of two or more credible witnesses, *direct, limit, or appoint*; and as well in default of such appointment as until the same shall be made, to the intent that the said trustees shall stand seised of the same upon trust, that they and their heirs shall pay the rents of all such lands, &c. as shall so remain unsold to the proper hands of *countess-dowager of Anglesey, during her life, for her separate use*; and subject to the trusts aforesaid to this further intent, that the said trustees, and their heirs, shall stand seised of all the said lands, &c. which shall so remain unsold, to the use of themselves and their heirs, during the life of countess-dowager of Anglesey, to preserve the contingent remainders.

remainders. And after the determination of that eſtate,
To the uſe of the firſt and every other ſon of the counteſs-dowager of Angleſey by lord Aſhburnham lawfully begotten, in tail male;
Remainder to counteſs-dowager of Angleſey, and the heirs of her body;
Reverſion in fee to counteſs-dowager of Angleſey.
Soon after this, counteſs-dowager of Angleſey married lord Aſhburnham.

By deed-poll, after recitals of the truſts, &c. (for now facilitating the truſt, ſettling the lands unſold in the abſence of the duke of Ormond, then in parts beyond the ſea), it is witneſſed, declared, and agreed, by the ſaid lord Aſhburnham, lady Henrietta Maria Aſhburnham his wife, the duke of Ormond and earl of Arran, and the ſaid lady Aſhburnham, by virtue of her ſaid power, and all other powers in her veſted, by and with the conſent of the ſaid duke of Ormond and earl of Arran, teſtified as aforeſaid, directs, limits, or appoints, the ſurplus-money *ariſing by the ſale* of the ſaid eſtate to be laid out in purchaſing lands, to be ſettled as therein is appointed; and that all the lands, &c. by the ſaid indenture of releaſe veſted in the ſaid truſtees and their heirs as aforeſaid, which ſhall remain unſold after all and every the truſts in the ſaid indenture of releaſe declared concerning the ſame ſhould be fully performed, ſhall be, by the ſaid truſtees and their heirs, *conveyed* and aſſured to ſuch perſon and perſons, and for *ſuch uſes*, eſtates, intents, and purpoſes, as the ſaid lady Aſhburnham, *whether* covert or ſole, notwithſtanding her then preſent coverture, by and with the like conſent of the earl of Arran, teſtified as aforeſaid, ſhould, by any deed or deeds, writing or writings, to be by her duly ſealed and delivered in the preſence of two or more credible witneſſes, direct, limit, or appoint: and as well in default of ſuch appointment as until the ſame be made, to and for ſuch uſes, &c. as by the ſaid indenture of releaſe are in ſuch caſe expreſſed, concerning the lands, &c. ſo remaining unſold, after the truſts therein declared are performed.
N. B. This deed-poll, though all four are mentioned to be parties to it, was executed only by the duke of Ormond. 20 Aug. 1715.

By another deed-poll, (after recital of her power as to the ſurplus-money, without reciting the former deed-poll), the ſaid lady Aſhburnham, by and with the conſent and approbation of the lord Aſhburnham and earl of Arran, teſtified 13 July, 1716.

teſtified as aforeſaid, directs, limits, and appoints, that the ſurplus-money ariſing by the ſale of the ſaid eſtate, ſhould (by the conſent of lady Aſhburnham, teſtified as aforeſaid) be laid out in the purchaſe of lands, &c. and the ſame when purchaſed, and the monies ſo to be raiſed in the mean time, and ſuch of the lands, &c. in the ſaid indenture of releaſe mentioned, as ſhould remain unſold after the truſt therein mentioned performed, ſhould be ſettled to ſuch uſes, truſts, intents, and purpoſes, as lady Aſhburnham ſhould, by any deed or deeds, or by her laſt will and teſtament in writing, in the preſence of three or more credible witneſſes, whether ſole or married, and notwithſtanding her coverture, and as well with as without the conſent of the ſaid earl of Arran or the ſaid duke of Ormond, ſhould direct and appoint; and as well in default of ſuch appointment as until the ſame ſhall be made, upon the ſeveral truſts, and to the ſeveral uſes, intents, and purpoſes, by the ſaid indenture of releaſe were directed, limited, and appointed of the ſaid premiſes. And this was executed by lord and lady Aſhburnham and earl Arran.

30 Aug. 1717. By indenture ſextipartite between lord and lady Aſhburnham of the firſt part, and others of the other parts, reciting, that part of the arrears in the firſt truſt-deed had been paid off, and that others ſtill remained due; and reciting alſo two deeds poll of the 20th of Auguſt 1715, and 13th July 1716, and that lord Aſhburnham had contracted ſeveral very conſiderable debts ſince his marriage; the ſaid lady Aſhburnham, in purſuance of the power given to her by the ſaid indenture of releaſe, and all other powers in her veſted, doth direct and appoint, after the truſts in the ſame indenture are performed, that the truſtees, and the ſurvivor of them, and the heirs of ſuch ſurvivor, ſhall convey all and every the truſt eſtate which ſhall then remain unſold for the purpoſes aforeſaid, to four other truſtees, their heirs and aſſigns, in truſt, with or without the conſent of lord and lady Aſhburnham, to ſell the ſame, and out of the purchaſe-money to pay ſeveral conſiderable debts not mentioned in the firſt-truſt-deed, with intereſt and charges; and to pay the reſidue of the money ariſing by the ſale (if any) as in this deed is appointed: and in caſe any of the ſaid premiſes ſhall remain unſold, then in truſt, to be by the laſt truſtees and their heirs conveyed to ſuch perſons, and for ſuch uſes, &c. as lady Aſhburnham ſhould appoint: and for want of, and until ſuch appointment, to and for ſuch uſes, eſtates, &c. as are expreſſed

preſſed in the ſaid indenture of releaſe concerning the lands which ſhould there remain unſold after the truſts performed.

Lady Aſhburnham is ſince dead, leaving an only daughter by lord Aſhburnham, who is an infant.

By a decree made in a cauſe, wherein the ſaid infant by her *prochein amy*, *J. C. A. C.* and ſeveral other perſons, as well for themſelves as other creditors of the ſaid lord Aſhburnham, are complainants; and the ſaid lord Aſhburnham, the truſtees in the firſt truſt-deed, two of the principal creditors in the ſecond truſt-deed, and the truſtees in the ſecond truſt-deed, are defendants; it is decreed, That the ſeveral truſts created by the ſaid deeds of the 22d of July 1714, and the 30th of Auguſt 1717, ſhall be executed and performed; and 14 July. 5 Georgii.

That three of the truſtees in the laſt deed ſhall releaſe to *E.* another truſtee in that deed; and that the three truſtees in the firſt deed ſhall ſell or mortgage ſo much and ſuch part of the ſaid truſt eſtate as remains unſold, as the maſter ſhall find neceſſary for raiſing money to diſcharge the *truſt debts that ſhall remain* unpaid; in which ſale or mortgage *E.* is to join; and the ſaid maſter is to allow of the ſaid ſale or mortgage, and to ſee the money raiſed thereby applied to pay the aforeſaid debts.

And when all the truſts in the aforeſaid deeds are performed, the plaintiff the infant is at liberty to reſort to the court touching the diſpoſition of the reſidue of the ſaid truſt eſtate for her benefit.

It appears by the decree, that the two truſt-deeds of the 22d of July 1714, and the 30th of Auguſt 1717, were read; but no mention is made of the deeds poll of the 20th of Auguſt 1715, and the 30th of July 1716.

The eſtate has been put up to ſale before the maſter, and *F.* is reported the beſt purchaſer; and now, upon looking into the title, it is found, that the deed-poll of the 20th of Auguſt 1715 has been only executed by the duke of Ormond; whereas, regularly, lord and lady Aſhburnham, the duke of Ormond, and earl of Arran, ſhould have executed it; and if this defect be not ſupplied by the court of chancery, the conſequence is, that the eſtate is not liable to the charges in the ſecond truſt-deed, and the title of *F.* as to ſo much, will be defective.

Whether the decree of the court of chancery has ſupplied the defect; and, Whether *F.* purchaſing under the ſaid decree, will have a good title in equity againſt the Quære.

ſaid

ſaid infant, and her iſſue in tail, who, after the death of lady Aſhburnham, are to take by the firſt truſt-deed, in default of an appointment by lady Aſhburnham in purſuance of her power?

N. B. This decree is for payment of lord Aſhburnham's debts, and not lady Aſhburnham's, whoſe eſtate this was.

Anſwer.

THE defect ſeems to me to be but little more than a formality, that the two truſtees ſhould conſent together by the ſame deed: and whereas by the firſt deed there is a power in my lady, by the conſent of the duke of Ormond and lord Arran, to diſpoſe, the duke Ormond does it by one deed, and the earl of Arran by another; and if the words of the decree for diſcharging the truſt debts remaining unpaid extend to all the truſt debts appointed by my lady Aſhburnham to be paid by any of the truſtees, I think that decree will be ſufficient.

March 15, 1721. THO. LUTWYCHE.

Case 2. A teſtator by his will after deviſing land to his ſon for life, remainder in ſtrict ſettlement, empowers his ſon, in the manner and with the conſent therein-mentioned, to revoke and annul the eſtates therein before limited, and to ſell or exchange any part of the hereditaments concerning which ſuch revocation ſhould be made for other hereditaments, ſo that the monies to ariſe by ſuch ſale were laid out in the purchaſe of other lands. Teſtator dies. The ſon being anxious to ſettle an eſtate of which he was ſeiſed in fee to the uſes of the deviſed premiſes—The Opinions of Sir Dudley Ryder, Mr. Filmer, and Mr. Booth, upon the moſt eligible mode of effectuating this purpoſe.

SIR J. JACKSON by will gives land to his ſon for life; remainder in ſtrict ſettlement; in which will is the following power:

"Provided always, and I do hereby direct, that it ſhall "and may be lawful to and for my ſaid ſon G. Jackſon, "at any time during his life, by any deed or writing un- "der his hand and ſeal, ſigned and ſealed in the preſence "of two or more credible witneſſes, with the conſent "of the ſaid *G. J.* my nephew, *J. M.* and *T. H.* my ſaid "truſtees, or the ſurvivors or ſurvivor of them, but not "otherwiſe (ſuch conſent to be ſignified by writing under "their hands and ſeals, or under the hands and ſeals of "the ſurvivors or ſurvivor of them, and to be atteſted as "aforeſaid), to revoke, annul, and make void, all and every "of the uſes, eſtates, truſts, and limitations, hereinbefore "limited, mentioned, and declared, of and concerning all

"or

"or any part or parts of my ſaid freehold or copyhold "eſtates before by me deviſed as aforeſaid (except my "advowſon, and right of patronage and preſentation to the "church of Reed, in the ſaid county of Hereford), and to "ſell or exchange all or any part or parts of the ſaid pre- "miſes, touching which ſuch revocation ſhall be made, "for other freehold or copyhold lands or hereditaments, "ſo as the monies to ariſe and be received by ſuch ſale be "immediately laid out and inveſted in the purchaſe of "other lands or hereditaments, ſo to be purchaſed or taken "in exchange, ſituate in that part of Great Britain called "England, and be of equal value to be ſold, and be of as "great or greater yearly value as my ſaid freehold or "copyhold eſtates whereof the uſes ſhall be ſo revoked; "and that the lands and hereditaments ſo to be purchaſed "or taken in exchange ſhall be well and ſufficiently con- "veyed and ſettled unto and upon my ſaid nephew G. "Jackſon, *J. M.* and *J. H.* or ſuch of them as ſhall be "then living, and their heirs, to the ſame uſes, upon the "ſame truſts, and for the ſame intents and purpoſes as I "have herein-before deviſed my ſaid freehold and copy- "hold eſtates, or to or for ſuch of the ſaid uſes, truſts, in- "tents, and purpoſes, as ſhall be then ſubſiſting and un- "determined, any thing in this my will before contained "to the contrary thereof in anywiſe notwithſtanding."

At the time of making this will, ſir J. Jackſon was ſeiſed for life of other premiſes at *W.* with the immediate remainder thereof to his ſon in fee.

Sir John died. His ſon having entered on all the eſtates, and being willing to execute this power and to revoke the uſes, drafts of indentures of leaſe and releaſe have been prepared, whereby he revokes the uſes limited of the pre- miſes by the will, and declares that they ſhall be to the uſe of him the ſaid *G. J.* the ſon in fee; and in conſidera- tion thereof the ſaid *G. J.* grants and releaſes to the truſtees the premiſes at *W.* to hold to the truſtees in fee to and for ſuch uſes, truſts, powers, intents, and purpoſes, as are de- clared by the ſaid will concerning the premiſes thereby deviſed.

It has been doubted, upon the peruſal of theſe drafts, Whether by this method the uſes of the land deviſed by the will will be ſo effectually revoked as that a purchaſer can be ſafe in taking a conveyance from G. Jackſon thereof? for that it ſeems doubtful, whether *G. J.* has any power to revoke (except for the purpoſe of an actual ſale

or

or exchange); and if ſo, no uſe can ariſe but to the perſon who ſhall be intitled to take under ſuch ſale or exchange; and though the word *exchange* may have a larger meaning, yet it is doubted here whether the exchange intended by the teſtator can be any other than a ſtrict legal exchange, according to the notion of law.

It is therefore propoſed, that G. Jackſon convey to truſtees the premiſes at *W.* in truſt, for the purpoſe of exchanging; that then by a deed of exchange the ſaid G. Jackſon, together with the truſtees under the will, ſhould revoke the uſes under the will; then grant in exchange the premiſes at *W.* to *G. J.*; then by another deed, *G. J.* is to convey to his truſtees to the uſes of the will.

It is likewiſe propoſed as another method, that *G. J.* ſhould convey the premiſes at *W.* to *J. S.*; that then *G. J.* ſhould revoke the uſes of the will, and ſell the land deviſed by the will to *J. S.* for a full valuable conſideration to be paid by *J. S.*; that then the ſaid *G. J.* ſhall lay out the money ariſing by ſuch ſale in the purchaſe of the premiſes at *W.* of *J. S.* and he convey to the truſtees for the uſes of the will.

Which is the beſt method of theſe three? and, Whether the firſt, of the leaſe and releaſe, is not a ſtrict legal execution of the power, which is the moſt to be wiſhed for, becauſe it may be done by the ſame conveyance? and as the father at his death left the ſon ſeiſed of *W.* and the other lands in fee, Whether a court of law would not intend the ſubſtituting ſuch premiſes to the uſes of the ſettlement in lieu of thoſe which he had power to take out, to be within the full meaning of the word *exchange*? and if ſo, Whether this conveyance by leaſe and releaſe is not the propereſt method?

Sir D. Ryder's Opinion.

THE word *exchange* in the will can only mean the ſubſtituting another eſtate in the room of this by any legal conveyances, and not the ſtrict legal exchange, which cannot operate but where the ſame intereſt in each exchanged lands paſſes from the one to the other; which cannot be the preſent caſe, as nothing can paſs from *G. J.* in ſtrictneſs, but his own particular eſtate for life (if it is no greater, as I ſuppoſe it is not) but yet an eſtate in fee is entitled to paſs, and will do ſo: and on the other

ſide,

ſide, though he will receive an eſtate in fee by the exchange in poſſeſſion, yet he will convey the particular eſtates in the lands he gives in exchange.

I think, therefore, the method propoſed by way of leaſe and releaſe will be beſt; only *G. J.* the ſon may alſo grant and convey in the ſame deed the premiſes to the uſe of himſelf in fee, as well as declare the uſe ſo to be, and therein mention the conſideration thereof to be the ſettlement thereinafter made of the eſtate at *W.*

January, 1746. D. RYDER.

Mr. FILMER's OPINION.

I APPREHEND, it would be too ſtrict a conſtruction of this power to conſtrue the words "ſo as the lands taken "in exchange be ſettled to the ſame uſes," to mean a ſtrict legal exchange, according to the notion of law; but I rather think the general intention of the parties to have been, that the revocation ſhould be good, provided lands of equal value were anyways ſettled to the ſame uſes. Therefore, if by mr. Jackſon's revocation of the uſes the ſettled lands will be veſted in him and his heirs (for there is no power to limit new uſes), I am inclined to think, the method firſt propoſed will be good; though either of the other methods, I think will be more conformable to the words of the power.

January, 1746. BEV. FILMER.

Mr. BOOTH's OPINION.

I AM of opinion, that G. Jackſon the ſon has not, by the words of this will, any power given him to revoke any of the uſes, for the purpoſe of taking to himſelf or limiting to himſelf in fee any of the lands ſettled by the will, and ſubſtituting other lands of his own in lieu thereof, or by way of commutation for the ſame; it appearing to me, that the ſole power which ariſes to him under this will

to revoke, is to revoke for one of these two purposes; either that of making an actual sale, or that of making an actual exchange: for if you throw the superfluous words out of this will, you will find the material ones to be these: "that "it shall be lawful for the said G. Jackson to revoke the "uses concerning the premises, or any part thereof, and "to sell or exchange all or any part of the premises touch-"ing which such revocation shall be made, so as such con-"ditions as are there mentioned be observed and per-"formed;" which words "to sell or exchange" seem to me to mean the same as if he had used the words following, *viz. and to convey by way of sale, for a full consideration in money, or by way of exchange for or in lieu of other lands of equal value, all or any part of the said premises*; in which words (which I take to be those which are found in the most approved forms) there would have been, I think, little doubt but that the exchange intended must be such an one as would bear as near a resemblance as possible to the strict legal exchange, where there is a gift or grant by one of one parcel of land to another in consideration of the receipt of another parcel of land from that other person, by way of like grant, in recompence for the first; in which conveyance there are always reciprocal acts; and the lands of the first donor are said to be given or conveyed in exchange, or, more shortly, exchanged; and the lands received from the second donor are said to be those taken in exchange.

Now that this must be the exchange meant by the testator here, appears by the perusing of the condition. There the words, though a little inaccurate, are, "so as "the monies to arise by such sale be laid out in the purchase "of other lands of equal value, and that the lands so to be "purchased or taken in exchange be settled to the same "uses:" which words "taken in exchange" shew clearly, that he was to revoke for that purpose of so giving or conveying in exchange as to be entitled to take in exchange

at

at the ſame time, and to me ſeem ſtrongly to exclude a revocation for that purpoſe of ſubſtituting lands of his own; which caſe does not appear to me to be ſo much as thought of by the teſtator: for the words "taken in ex-"change" ſtand oppoſed in relation to the word or term *exchange* uſed before, and are as corelative to it: and if ſo, theſe words "taken in exchange" will fully explain the meaning of the former word *exchange*, and prove almoſt demonſtrably, that ſuch an exchange was meant by it as would come the neareſt to a grant in exchange, according to the ſtrict notions of law; in which grant the word *exchange* is of ſuch force, that, according to lord Coke, no other expreſſion or circumlocution can have the ſame effect.

To this expoſition it is objected, that were this to be a ſtrict legal exchange, the ſame intereſt muſt paſs from one to the other in the exchanged lands; which cannot be, becauſe G. Jackſon has but an eſtate for life, and can give no more than he has; whereas he muſt receive a fee. But, under correction, I deny, the ground on which this is founded; for although it be true, that G. Jackſon has no greater intereſt than for his life, yet when he executes his power of exchanging, he is the declarer of the uſe, and a fee paſſes out of the eſtate of the perſons who are the deviſees to the uſes in the will: for it has been reſolved, that a deviſe to an uſe may be as well as a feoffment to an uſe; and the uſes under ſuch deviſes will have the ſame operation as uſes under feoffments.

Now, had this been an exchange under a power to *G. J.* on a feoffment to theſe uſes, more would have paſſed under *G. J.*'s exchange than an eſtate for life; for the fee would have paſſed to the donee or perſon taking under the exchange, the conveyance of the exchange being really a declaration of the uſes of the feoffment; and the eſtate of ſuch donee or perſon ſo taking in exchange would none of it have been at all ſevered out of G. Jackſon's eſtate for life;

and this appears clearly from Whitlock's Case, in lord Coke.

So in the case of this devise; for, I think, there is no kind of difference; as great an interest would have passed under an exchange under this power from *G. J.* or by his means, as would have been received in the lands taken in exchange for those granted by him. Neither does it seem at all necessary, that the exchange which *G. J.* was to be enabled to make should have all the properties and ingredients of legal exchanges, and should exactly resemble them in all circumstances; for if this were necessary, then leases which should be made under powers should have all the ingredients of legal leases; which seems to me to be in nowise necessary; and if it were, would lead us God knows whither.—For example. In common leases the lessee till entry has only an *interesse termini*, and he has no actual estate, so that the lessor has no reversion; but where the lessee actually enters, then he has an actual estate in possession divided from the reversion, and then the lessor may grant the reversion; whereas upon a lease under a power, the lessee upon the very sealing has an actual estate in possession divided from the reversion; and therefore some Books say, these are not real estates, but only declarations of uses to such and such persons for years; all which shews, these powers do not intend real leases, but certain acts that bear as near a resemblance to leases as possible.

These being the arguments that lead me to think the word *exchange* in this power of revocation means an act that bears as near a resemblance to strict legal exchanges as possible (and in which legal exchanges there must ever be reciprocal acts of exchange between two different persons), I conceive it will be easily granted, that if this word *exchange* in this power has this meaning, a revocation by mr. *G.* Jackson for the purpose of limiting the uses to himself

ſelf in fee, in recompence of lands which he ſubſtitutes to the uſes in the place of thoſe the uſe whereof are revoked by way of commutation, is not ſuch a revocation as a purchaſer will chuſe to rely on, ſince ſuch a purchaſer's title ought to be clear of all ſorts of doubts whatſoever.

I know, indeed, that there are a great many Caſes which prove, that powers of revocation ſhall have very liberal conſtructions, and that the law endeavours, with great benignity, to aſſiſt all executions of powers, of what nature ſoever; but theſe are general doctrines. There is a ſtrictneſs required in the execution of the eſſential parts of all powers. Thus, a power to make leaſes for three lives, or twenty-one years, does not authoriſe leaſes for ninety-nine years determinable on three lives: Whitlock's Caſe. A power to grant an eſtate of freehold does not extend to a chattel intereſt; Newport and Savage. A power to grant an eſtate out of lands does not authoriſe you to charge the eſtate with a rent-charge; Harvey and Harvey, *in Cane.* 1740. A power to charge does not give a power to grant an eſtate out of the land: Jenkins and Kerneys, 1 Lev. 150. 237, 238. Hardr. 395. Dyer, 263. Hence I conclude, that a revocation of uſes by mr. *G. F.* with a limitation in fee to himſelf upon a ſubſtitution of other lands, is not warranted by this power.

As to the other way, of actually conveying in exchange, I fear there is abundance of circuity and difficulty in that method; but I cannot but ſay I approve of it. But a revocation for the purpoſe of an actual ſale really made would, I conceive, be free from theſe objections: wherefore, if the parties can actually ſell theſe lands, I ſhall think, that a revocation for the purpoſe of and accompanied by ſuch an actual ſale will be valid; and I ſhall be ready to adviſe a purchaſer or mortgagee to lend his money thereon; otherwiſe I cannot ſay I think he will be ſafe.

January 21, 1746. JAS. BOOTH.

PRE-

PRESENTATION.

IN the year 1723 *J. C.* demiſed to *A. H.* eſq. deceaſed, ſeveral eſtates in the county of Norfolk, amongſt which was the rectory of Eaſton.

In the year 1727 theſe ſeveral eſtates were conveyed to Tyrrell and Watſon, upon truſt to ſell and pay off ſeveral incumbrances, particularly 10,000l. then due to mr. *H.*

In the year 1729 Watſon, then ſurviving truſtee, conveyed to Cook and Clayton, both alſo ſince deceaſed, upon the like truſts.

In the year 1732 *J. C.* conveyed to Cook and Clayton other his eſtates in the county of Norfolk; amongſt which was the vicarage of Eaſt Winch, upon truſt to ſell and pay off ſeveral incumbrances, particularly 8000l. then due to mr. Hutcheſon.

Mr. *H.* afterwards himſelf paid off the ſeveral incumbrances prior to his own affecting the whole eſtates, and was let into poſſeſſion, and continued in the receipt of the rents and profits until his death.

A decree was obtained in the year 1739 for ſale of theſe eſtates; under which mrs. Hutcheſon in the year 1742 became a purchaſer at 30,600l.; and on taking her account of the rents and profits it appeared, that there was due to her only the ſum of 30,247l. 5s. 1¼d.; ſo that her purchaſe-money exceeded her demand by 352l. 14s. 10¾d. which ſubſequent intereſt was afterwards increaſed to 379l. 8s. 7½d.

This reſidue of her purchaſe-money is ſtill unpaid, nor has any conveyance been executed to mrs. *H.* Mr. Clayton, who was the ſurviving truſtee, having left infant children, in whom, on his death, the legal eſtate was veſted. *The children are lately come of age*; ſince which time mrs. Hutcheſon's purchaſe is diſputed in the court of chancery, by bills at the ſuit of Cotton's heir at law, and of the executors of lord Arran, another conſiderable incumbrancer (but ſubſequent to mrs. Hutcheſon), on Cotton's eſtate. To theſe bills mrs. Hutcheſon has pleaded

ed her purchaſe; which pleas have been allowed, but the cauſes are not come to a hearing.

The before-mentioned living of Eaſton and Eaſt Winch have lately become void by the death of the incumbents; and ſir J. Tyrrell, as heir at law of Cotton, has preſented to them about a fortnight ſince; and it is ſuppoſed the preſentees have obtained inſtitution and induction.

What ſteps will it be adviſeable for, or can mrs. Hutcheſon take to avoid ſir J. Tyrrell's preſentations, and maintain her own right of preſenting or nominating? Quare.

MRS. HUTCHESON ſhould immediately apply to the heirs of mr. Clayton to make a preſentation of theſe livings to a clerk of mrs. Hutcheſon's naming, and ſhould indemnify mr. Clayton's heirs againſt all coſts and damages they may incur by ſuch preſentation. The preſentation is then to be given to the biſhop; and if he refuſes to give him inſtitution, ſhe muſt bring a *quare impedit* againſt the biſhop, ſir J. Tyrrell, and his clerk, in the name of the heirs of mr. Clayton. If the heirs of Clayton refuſe to have their names uſed, or ſhould releaſe ſuch action, if brought in their names without their conſent, let mrs. Hutcheſon make a preſentation in her own name, and deliver it to the biſhop; and upon his refuſal to inſtitute her clerk (which if ſir J. Tyrrell's clerk is really inſtituted and inducted the biſhop muſt refuſe), ſhe muſt bring a bill in chancery againſt ſir J. Tyrrell, his clerk, the heirs of mr. Clayton, and the biſhop, ſtating the caſe of her purchaſe of the eſtates, &c. the heirs of Clayton refuſing to preſent her clerk, praying a decree to compel ſir J. Tyrrell's clerk to reſign to the biſhop, the biſhop to accept ſuch reſignation, the heirs of Clayton to preſent mrs. Hutcheſon's clerk, and the biſhop to give him admiſſion and inſtitution: and I think, mrs. Hutcheſon will prevail in either of theſe two methods of proceeding; and that ſir John Tyrrell will pay coſts. Anſwer.

July 2, 1765. C. SAYER.

PRIORITY

PRIORITY OF DEBTS.

CASE I.

A teſtator dies indebted to *B.* by bond, and to *D.* for rent due upon a parole leaſe which is expired.—Mr. PEERE WILLIAMS's OPINION, Whether the executor had his election of preferring *B.* to *D.*?

A. DIES very greatly indebted, leaving only a perſonal eſtate, but that however not ſufficient to pay all his creditors. To *B.* he owed 5000l. on bond; to *C.* 2000l. on bond; to *D.* 50l. for rent of land let by a leaſe parole expired; and to ſeveral other perſons ſeveral other great ſums on ſimple contract.

A. made his will, and *E.* his executor, who has proved it, and got in a ſmall part of the eſtate.

D. threatens to ſue the executor at law for the rent; and ſome of the ſimple contract creditors threaten to file a bill in equity; to have an equal diſtribution of the eſtate among all the creditors.

The executor knowing the hardſhip of *B.*'s caſe, and that his is a debt that in conſcience ought to be paid before the reſt, is willing to confeſs a judgment to him, and give him the preference; but is not content, however, ſo to do till there is a neceſſity for it; but if neceſſary would do it immediately.

1. Quære. Whether it is in the executor's election to prefer *B.* before *D.* in reſpect of the money due to him for rent? and if *D.* ſhould bring an action againſt the executor for the rent, Whether the executor can plead *B.*'s bond in bar, or muſt, in that caſe, confeſs judgment to *B.* and plead the judgment in bar?

Anſwer. I AM of opinion, that this 50l. being in arrear of rent due upon a leaſe parole determined, is equal to a debt by bond, or other ſpecialty, in regard, though the leaſe be only by parole, yet the rent ſavours of the realty, as it iſſued out of land; and though the leaſe be determined, yet the nature of the debt remains the ſame, though the remedy for it by way of diſtreſs may be at an end.—*Note*, This very Caſe is reported in 2 Vent. 184. and 3 Levinz 267, Newport and Godfrey; and though it may ſeem that it is there held that the debt for rent is higher than a debt by bond, yet all that was in that Caſe reſolved or held was,

that

that theſe two debts were equal in their nature; for where there are two debts of equal degree due from an executor, the executor is ſued at law for one of them, the executor cannot plead the other debt of equal nature in bar, but ought to pay that debt firſt that is firſt ſued againſt him, where th e debts are equal, unleſs the executor chooſe to give judgment in a ſubſequent ſuit for another debt in equal degree: and the lord C. J. Holt, in Hilary Term, 9*W.* in the Caſe of Caſe and Acton, declared, that all that was reſolved in the Caſe of Newport and Godfrey was, that theſe debts were equal.

If any of the ſimple contract creditors ſhould prefer a bill againſt the executor for an equal diſtribution of the teſtator's eſtate among all his creditors, Can the executor, after ſuch bill preferred, confeſs to or ſuffer judgment to be recovered againſt him by *B.* and thereby give him a preference? or, Will it be beſt for the executor to let a judgment be obtained againſt him by *B.* before ſuch ſuit be commenced? 2. Quære.

IF theſe debts are of equal degree, *viz.* the debt for rent on a leaſe parole determined, and a debt by bond, then it would be plain, that before an action brought the executor may prefer in payment which of thoſe debts he pleaſes. Anſwer.

But if the debt for rent be ſuperior in its nature to the bond debt (which I think it is not), then it would be a *devaſtavit* in the executor to pay the bond debt before the debt for rent.

What I think reaſonable in this caſe is, that the bond creditor for 5000l. ſhould immediately bring his action againſt the executor upon the bond, and the executor to ſend notice of this to *D.* the creditor for the rent, deſiring and impowering the ſaid *D.* in the name of the executor, to plead his debt for rent, and to employ his own attorney therein; and to be at the ſole charge thereof, and if the court

court deliver their opinion that this debt for rent is a ſuperior debt, that then the executor will pay it.

As to the Second *Quære*, I do not ſee any colour for the ſimple contract creditors bringing a bill to be paid equally with the bond creditors; but to ſuch a bill the executor might demur: but the moſt that the ſimple contract creditors can with juſtice pretend to is, that after the bond creditors and ſuperior debts be all paid, that then the ſimple contract creditors may be paid equally; and ſuch a bill would hardly be worth their while.

I ſuppoſe and preſume, that the aſſets left by the teſtator are legal, and not equitable aſſets only; and if they are legal aſſets, they muſt be adminiſtered in courſe of adminiſtration, and every creditor to be preferred according to the degree of his debt; but if the aſſets are equitable aſſets only, then all debts of whatever degree are to be paid equally and *par pari*.

After a bill brought for an equal diſtribution of aſſets, it is not ſafe for the executor to make voluntary payments; but let ſuch creditors whom the executor would favour bring their action and recover judgment.

WM. PEERE WILLIAMS.

CASE 2.

A. B. having deviſed certain freehold and copyhold eſtates for ſeveral terms of years by way of mortgage for ſecuring different ſums of money, without having made any ſurrender of ſome parts of the copyhold, and afterwards deviſing the ſame eſtates, ſubject to ſuch mortgages and to other incumbrances impoſed by his will, and dying much involved, leaving a ſmall perſonal eſtate—The OPINION of Mr. FAZAKERLEY upon ſeveral queſtions ariſing reſpecting priority in the payment of the teſtator's debts.

23d April 1716. BY indenture between *H. W.* of the one part, and *J. B.* of the other part, the ſaid *W.* in conſideration of 200l. did grant, bargain, ſell, demiſe, and to farm let, all that meſſuage or tenement, &c. being freehold or charterhold, to the ſaid *B.* his executors, adminiſtrators, and aſſigns, for 1000 years, to be void on payment of 210l.

23d October 1717. By indenture tripartite between *B.* of the firſt part, *W.* of the ſecond part, and *C. B.* of the third

third part, *B.* in consideration of 200l. assigned the said premises to *C. B.* his executors, administrators, and assigns, for the residue of the 1000 years; and *W.* in consideration of a further sum of 800l. did grant, bargain, sell, and to farm let, all his freehold messuages lying in *E. S.* and *F.* and *not therein-before assigned* to *C. B.* his executors, administrators, and assigns, for 500l. years, to be void on payment of 1050l.

18th April 1724. By indenture tripartite between *C. B.* of the first part, *W.* of the second part, and *R. P.* of the third part, reciting, that the said *W.* by sale of the said lands in *E.* aforesaid, had paid to *C. B.* all the principal money and interest due upon the mortgage, and to do which did borrow of the said *P.* 500l. for securing the payment whereof did surrender all and singular his copyhold lands, tenements, and hereditaments holden of the manor of *W.* to the said *P.* his heirs and assigns; and in consideration of the 500l. and 100l. more then advanced by *P.* to *W.* the said *C. B.* did bargain, sell, assign and set over all and singular the said messuages, lands, tenements, &c. in and by the said indenture tripartite assigned by *B.* to *C. B.* to *P.* his executors, administrators, and assigns, for the remainder of the said 1000 years. And for the considerations aforesaid, the said *C. B.* did bargain, sell, assign, and set over, and the said *W.* did ratify and confirm all and singular the said freehold messuages by the said *W.* and by the said indenture tripartite granted, &c. to *C. B.* (other than and except such part as is situated in *E. S.* and *F.* aforesaid, with the appurtenances) to the said *P.* his executors, administrators, and assigns, for the residue of the said 500 years, to be void on payment of 630l.

18th July 1734. By indenture between *W.* of the one part, and *P.* of the other part, *W.* as well in consideration of the said 600l. then due and owing to the said *P.* as of the further sum of 400l. then lent to *W.* did demise, grant, bargain, and sell, all his freehold messuages, &c. situate, lying, &c. in *E. S. F. P.* and *W.* or elsewhere in the county of *S.* to *P.* and his executors, administrators, and assigns, for the term of 400 years; and reciting, that *W.* was seised of divers lands, &c. holden of the manor of *W.* and was intitled to the reversion, expectant upon the death of *E. W.* his mother, of certain lands holden of the manor of *E.* the said *W.* for the considerations aforesaid, did covenant to surrender all and singular his messuages, lands, tenements, &c. (at the request of *P.*) held of the

said

ſaid manors, or any other manor whatſoever whereof he was a copyholder, to the uſe and behoof of *P.* his heirs and aſſigns, to be void upon payment of the ſaid 1000l. and intereſt.

18th July 1735. By indenture between *W.* of the one part, *R. X.* of the other part (reciting that *P.* died inteſtate, by means whereof his real and perſonal eſtate came and deſcended to *S.* wife of the ſaid *X.* as his niece and next heir, who had duly adminiſtered), the ſaid *W.* in conſideration of 1000l. then due and owing on the ſaid laſt ſecurity, and to ſecure the repayment thereof, did remiſe, releaſe, and quit claim to *X.* as well all the eſtate, right, title, intereſt, equity of redemption, claim and demand which he then had, or which at any time thenceafter during the reſidue of the ſaid ſeveral terms of years ſhould or might have claim, challenge, or demand, of, in, or to all or *any of the abovementioned meſſuages, lands, &c.* to hold all and ſingular the ſaid meſſuages, &c. in the ſaid ſeveral indentures mentioned, with their and every of their appurtenances, to *X.* his executors, &c. for the reſidue of the ſaid 1000 years, or any other term of years by the ſaid ſeveral indentures granted then to come and unexpired, to be void on payment of 1050l.

19th Aug. 1740. By indenture tripartite between the ſaid *X.* of the firſt part, *W.* of the ſecond part, and *M. V. P. V.* and *E. V.* (executors of *E. V.*) of the third part, in conſideration of 1000l. paid by *V.* to *X.* and 100l. to *W. X.* did bargain, ſell, &c. *ſ. W.* did ratify and confirm all and every the meſſuages, lands, &c. in and by the ſaid ſeveral indentures granted and demiſed, with their and every of their appurtenances, to *V.* and for the reſidue of the ſaid ſeveral terms of 1000, 500, and 400 years, and to be void on payment of 1156l. with a covenant to ſurrender the copyhold of the manors of *W.* and *E.* to *V.* ſubject to the ſaid proviſo.

9th Auguſt 1744. By indenture between *W.* of the one part, and *V.* of the other part, reciting, that for the conſiderations in the laſt mentioned indenture the ſaid *X.* did bargain, ſell, aſſign, transfer, and ſet over, and the ſaid *W.* did ratify and confirm all and every the meſſuages, &c. in and by the ſaid ſeveral indentures granted, &c. that is to ſay, all that meſſuage or tenement encompaſſed, &c. and that the ſaid ſurrenders were duly paſſed purſuant to the ſaid covenant, the ſaid *W.* in conſideration of 100l. paid by *V.* did ratify and confirm unto *V.* &c. all and every the

the freehold and charterhold meſſuages, lands, &c. in the ſaid ſeveral indentures compriſed, and therein before particularly mentioned, for the reſidue of the ſaid ſeveral terms of 1000, 500, and 400 years, ſubject to the like redemption as is mentioned in the laſt indenture; and did thereby declare, that the ſaid freehold and copyhold premiſes therein before-mentioned ſhould as well be charged with the ſaid 100l. then advanced, as the ſaid 110l. and intereſt.

The greateſt part of the aforeſaid eſtates are copyhold, *and no ſurrenders appear to have been paſſed* except of the *premiſes holden of the manors of* W. *and* E.

27th July 1745. *W.* by a will duly executed, gave and deviſed to his ſiſter *S. T. all thoſe his meſſuages*, both *freehold and copyhold or leaſehold*, ſituate, lying and being in the ſeveral pariſhes of *P.* aforeſaid *E.* and *K.* in the ſaid county of *S.* and which were then in his own occupation, and in the occupation of , to hold unto her his ſaid ſiſter *S. T.* her heirs and aſſigns for ever; all which premiſes he willed to be *ſubject to and charged* with *all incumbrances thereupon, except a debt due to R. W.* which he willed and ordered to be paid out of a farm in *S.* hereinafter mentioned, and with the payment of the ſeveral ſums thereinafter mentioned given by the will as legacies for mourning, &c. and alſo to her daughters *S.* and *E.* 100l. a-piece, to be paid by their ſaid mother within two years after his death; and charged the premiſes alſo with the payment of the yearly ſum of 6l. to his ſiſter *M. W.* for life, with power of entry and to diſtrain, &c. on non-payment; and did give and deviſe to his ſiſter *D. H.* and her heirs for ever, all thoſe his meſſuages, lands, &c. both freehold and copyhold, ſituate in *F. S.* and *W.* in *S. ſubject to all incumbrances thereupon, except as thereinafter excepted*, and charged with the ſeveral payments thereinafter mentioned; and his will and mind was, that in caſe his ſaid ſiſter *D. H.* ſhould refuſe to clear off and diſcharge the incumbrances upon his meſſuages in *E.* aforeſaid, which was due to the ſaid *R. W.* the ſaid lands being mortgaged to him for one and the ſame ſum, that then he did revoke and make void the deviſe of his ſaid *S.* lands to his ſaid ſiſter *D. H.* and did deviſe the ſame to his other ſiſter *S. T.* but charged with the paytnent of two legacies; and reciting, that the ſaid meſſuages and lands in *S.* aforeſaid were alſo mortgaged unto his brother *W. T.* deceaſed, late huſband of the ſaid *S. T.*; and did thereby declare his mind and will to be, that unleſs his ſaid ſiſter *T.* or her repre-

repreſentatives, did on demand clear off and diſcharge the ſaid *S.* lands from all incumbrances on account thereof, then he revoked the deviſe to her of the lands in *K.* and did in ſuch caſe deviſe the ſame to his ſaid ſiſter *D. H.* and her heirs for ever, to the intent that his ſaid ſiſters *S. T.* and *D. H.* might be thereby obliged to diſcharge and ſet clear each other's eſtates from theſe intervening incumbrances, and be the better enabled to convey their ſeveral and reſpective eſtates in the premiſes unto ſuch uſes as they ſhould ſee proper; and he did give and bequeath unto *E.* the wife of *J. W.* (late *E. H.*) one bond or ſecurity of 100l. due to him from *J. B.* which bond he deſired his executors to deliver up unto her, or to her huſband, immediately after his death, and that his ſaid executors would be aiding and aſſiſting unto them in the recovery thereof, if needful; and of his will he appointed *S. T.* and *D. H.* executrixes, deſiring them to pay all his juſt debts.

The executrixes delivered the ſaid bond to *W.* purſuant to the will.

Mrs. *T.* (who was executrix to her huſband *W. T.*) has ſince diſcharged the ſaid mortgage upon the *S.* eſtate (which was 300l.), by entering ſatisfaction upon the court rolls of the ſaid manor; but mrs. *H.* has *not yet diſcharged the incumbrances* upon the eſtate at *E.* according to the directions of the ſaid will.

20th September 1738. Bond from mrs. *T.* and *H. W.* to *K.* for 100l. and intereſt (of which mrs. *T.* had a moiety) but the ſame is not yet diſcharged.

1ſt. October 1741. Bond from mr. *W.* to mrs. *T.* for 250l. and intereſt, which principal ſum never was yet diſcharged, nor any intereſt thereof.

The teſtator's perſonal eſtate is very inconſiderable.

The eſtates given to mrs. *T.* in the ſaid will are about———

Thoſe given to mrs. *H.* about———

There is alſo an incumbrance of 200l. upon the eſtate at *K.* and mrs. *H.* ſays the eſtate at *W.* is clear.

Mrs. *T.* has by ſale of the eſtate at *P.* and *W.* paid mrs. *V.* 600l. for part of the principal and intereſt due upon a mortgage; and accordingly did by articles of purchaſe, in conſideration of twenty-one years purchaſe for the freehold, and ſixteen years for the copyhold, agree to convey the eſtate in *P.* and *W.* to *S. S.*; in which articles is contained a covenant that the ſaid *S.* his heirs, execu-

tors,

tors, or adminiſtrators, ſhould pay, or cauſe to be paid, the intereſt of the purchaſe-money from the day of the date thereof, during the time he ſhall receive the rents and profits of the ſaid premiſes, until the ſame are conveyed as aforeſaid. *S.* paid the abovementioned 600l. to mrs. *V.* in part of the purchaſe, but the conveyances of the ſaid eſtate are not yet executed.

As the ſaid mortgage to mrs. *V.* has been ſo often transferred, and the ſecurities ſo often changed according to the preſent circumſtances thereof, Are the eſtates at *S.* and *F.* as well ſubject to the preſent incumbrance of 1200l. as the eſtates at *P. W.* and *E.* and are they thereby liable to an equal proportion thereof, according to the value of the ſame? 1. Quære.

IT does not appear what is become of the *term of* 1000 years for which theſe *eſtates were demiſed* to *C. B. this term* being *excepted on the aſſignment* of 1724; but for any thing appearing to the contrary, the ſaid term of 1000 years in the eſtates in queſtion remains a ſatisfied term in *C. B.* But it appears by the next indenture, the eſtates in this queſtion were again ſubject to the mortgage by a demiſe for 400 years by the indenture of 1734; and therefore, under theſe circumſtances, the eſtates in *S.* and *F.* as well as the eſtates at *P.* &c. *are liable to the mortgage of* 1200l. Anſwer.

As the teſtator's perſonalty is very inconſiderable, Are not the eſtates given to mrs. *H.* (by the ſaid will) as well as mrs. *T.*'s, liable to both the aforeſaid *bonds*, or either and which of them? and, Will *they not be deemed prior to the legacies therein* given, notwithſtanding the ſaid eſtates are made ſubject thereto? and if the perſonal eſtate ſhould amount to *more than is expected*, Cannot mrs. *T.* retain aſſets in her hands *ſufficient to diſcharge the aforeſaid bonds*, or either and which of them, and any other debts due to her from the ſaid teſtator, before *the reſt of the creditors* in equal degree? and, Will the fines, fees, &c. which ſhe has paid for her admiſſion to the ſaid eſtates be eſteemed a charge thereon, or on the perſonalty only? and in caſe the perſonal eſtate ſhould be *inſufficient to diſcharge* the ſaid teſtator's debts, &c. Cannot the ſaid *W.* (to whom the ſaid bond of 100l. was delivered) be compelled to *refund, and in what manner?* and if *W. ſhould be unable to do ſo,* 2. Quære.

Will

Will the ſaid executrixes *be liable to pay the ſaid teſtator's creditors out of their own pockets to the full amount thereof?*

Anſwer. ALL the freehold eſtates ſo given are *liable to all bonds wherein the heirs are bound*, and they will be *prior to legacies.* Mrs. *T.* may retain ſo much of the aſſets as ſhe pays *for the bonds*, but not to the *prejudice of creditors*; and ſhe may give *herſelf a preference* by way of retainer, with reſpect to any after-debts *due to her againſt creditors in equal degree.* Fines and fees for the admittances muſt be borne hy the eſtates to which ſuch admittances belong. You cannot *make a creditor refund money* he has received for his debt; and executors always pay creditors *at their own* peril: but the debt in queſtion being a *bond debt*, the real eſtate is liable.

3. Quære. The teſtator having made his real eſtates ſubject to the annuity and all the legacies given by the ſaid will, and as the ſaid eſtates will not be ſufficient to diſcharge the whole, Will it not be right to *make an equal diſtribution* to the legatees according to the ſeveral legacies therein given, and will not the above-mentioned bond be deemed as a legacy? and, Will the annuitant be *eſteemed ſuperior to the legatees*, and have a right to be firſt diſcharged or not? and in caſe there ſhould not be a ſufficiency for the ſaid annuity after payment of the ſaid teſtator's debts, and as that may be an obſtacle to the ſale of the ſaid eſtates, Cannot the executrixes compel the ſaid annuitant to join therein, and how? and as mrs. *T.* has and intends to make ſale of the ſaid eſtates (deviſed to her by the ſaid will) in order to diſcharge the ſeveral incumbrances thereon, debts, &c. of the ſaid teſtator, Cannot ſhe compel mrs. *H.* to make immediate ſale of her eſtate (given by the ſaid will) for the like purpoſe, and how? and, Will not mrs. *T.* be intitled to an equal moiety of the overplus, if any, of the whole of the ſaid eſtates, after payment of the ſaid teſtator's debts, &c.?

Anſwer. IF the eſtates be not ſufficient to pay the incumbrances, &c. affecting the ſame, the legatees and annuitants *muſt abate in proportion* with reſpect to the eſtates ſubjected thereto

thereto: if the legatees and annuitants, or the ſiſters, cannot agree, the whole muſt be ſettled in chancery; but it will be beſt for the parties to agree and join in a ſale.

Either mrs. *T.* or any perſon intereſted may compel mrs. *H.* either to *diſcharge incumbrances, &c. or to make ſale for that purpoſe.* The ſiſters will be entitled to the proportions of the ſurplus according to the reſpective values of their eſtates *given them, and the reſpective charges and incumbrances.*

4. Quære.

As mrs. *H.* has not yet diſcharged the incumbrance on the eſtate at *E.* in default of which the ſaid teſtator made the deviſe to her thereof void, and deviſed the ſame to mrs. *T.* and as *there is no time limited for the doing thereof*; therefore, What time will be adjudged *ſufficient* and *reaſonable* for her to do the ſame? and, Will it not be neceſſary for mrs. *T.* to give *her any and what notice*, or *make any demand of her to do it*; or can ſhe now *bring an ejectment*, or hoſk otherwiſe, to recover the poſſeſſion thereof? and, Can the ſaid mrs. *T.* inſiſt upon intereſt for the whole purchaſe-money of the ſaid eſtates at *P.* and *W.* according to the ſtrict words in the articles? and, What intereſt *per cent*, can ſhe juſtify taking, as the ſame is no wiſe limited therein?

Anſwer.

THERE is no way to ſettle this but in equity (which on account of the expence ſhould be avoided,) unleſs the parties can agree: for though mrs. *H.* has lapſed her time, which would be material at law, yet a court of equity would relieve her. There is no forming any judgment as to intereſt till the whole affair appears, becauſe at preſent it does not appear who (if any body) is to pay it.

1747. N. FAZAKERLEY.

PURCHASERS.

CASE.

A teſtator deviſed his manor to truſtees in truſt to ſell and to lay out the money ariſing therefrom in the public funds, or on government ſecurities, and afterwards to apply the ſame in the manner therein mentioned.—The OPINION of Mr. BOOTH, How far a purchaſer of this manor would be obliged to ſee to the application of his purchaſe money.

THOMAS DARCH by his will deviſed to truſtees his manor, &c. to hold to them, their heirs and aſſigns for ever, in truſt that they, or the ſurvivors or ſurvivor of them, his heirs or aſſigns, ſhould make abſolute ſale thereof entirely or by parcels, as to him or them ſhould ſeem meet, for the moſt money and price that could be got for the ſame; and the monies ariſing by ſuch ſale ſhould lay out or place out in ſome of the public ſtocks or funds, or on government ſecurities, and the income and produce thereof pay and apply to ſuch perſon and perſons, and in ſuch manner, and to and for ſuch uſes and purpoſes as are thereinafter mentioned; and gave his wife fifty pounds *per annum* for her life, which he directed ſhould be paid out of the produce of the money to ariſe by ſale of his eſtate. "And my will is, that the monies, in-"tereſt, and produce which ſhall ariſe by ſale of my ſaid "manor, &c. and the rents and profits thereof, until the "ſame ſhall be ſold, ſhall be for the uſe and benefit of my "ſaid ſon, his heirs, executors, and adminiſtrators:" but in caſe of his death before twenty-one, then in truſt for the uſe and benefit of ſuch other perſon and perſons who ſhould be entitled to enjoy his Taunton Dean lands.

The truſtees have agreed to ſell the eſtate which is deviſed to be ſold, and to place the purchaſe-money in the funds.

Quære. Will the purchaſer be anſwerable for the non-application or miſapplication thereof?

Anſwer. I AM of opinion that all that will be incumbent on the purchaſer to ſee done in this caſe, will be to ſee that the truſtees do inveſt the purchaſe-money in their own names in ſome of the public ſtocks or funds, or on government ſecurities; and in ſuch caſe the purchaſer will not be anſwerable for any non-application (after ſuch inveſting of the money) of any monies which may ariſe by the dividends or intereſt, or by any diſpoſition of ſuch funds, ſtocks, or ſecurities, it not being poſſible that the teſtator

ſhould

ſhould expect from any purchaſer any further degree of care or circumſpection than during the time that the tranſaction for the purchaſe was carrying on; and therefore the teſtator muſt be ſuppoſed to place his ſole confidence in the truſtees: and this is the ſettled practice in theſe caſes, and I have often adviſed ſo much and no more to be done; and particularly in the Caſe of the truſtees under the ducheſs of Marlborough's will.

1758. JA. BOOTH.

N. B. Mr. Wilbraham was of the ſame opinion.

RENT AND RENT-CHARGE.

CASE. 1.

A rent is granted out of lands to truſtees and their heirs for charitable uſes, with a power of entry if the ſame were not paid within a limited time; and no diſtreſs could be made, or being made, if the ſame were replevied. The donor alſo directed, that when the truſtees were reduced to two, new truſtees ſhould be appointed by the lord keeper for the time being.—Mr. FAZAKERLEY'S OPINION upon ſeveral queſtions ariſing upon this Caſe; *viz.* Firſt, Whether the aſſignees of the old truſtees could act without the appointment of the lord keeper? Secondly, Whether the truſtees had power to diſtrain? Thirdly, Whether the rent was liable to the payment of a proportion of the land tax?—See Ben. Rep. 19. pl. 29.

BY indenture of Mar. 10, 1628, between ſir Charles Morriſon and ſir Baptiſt Hicks of the one part, and John Smith and others of the other part, dame Dorothy Morriſon and ſir Charles Morriſon give and grant an annuity of 50l. a year to *A. B. C.* and *D.* and their heirs, payable quarterly out of ſeveral lands lying in the pariſh of King's Langley, in the county of Hertford, in truſt for four poor women and a preacher, with a *nomine pœnæ* of 40s. if not paid in thirty days after due, with a power of entry if the 50l. and penalty be not paid in forty days; and no diſtreſs can be made, or a diſtreſs be made and replevied, until the rent and all arrears be cleared: in which ſaid indenture there is contained a clauſe in what manner to elect new truſtees in the room of any who ſhall die or remove out of the pariſh, when they are reduced to two; with directions, that ſuch new truſtees be appointed by the lord chancellor or lord keeper for the time being.

N. B. The entry is given in caſe of no diſtreſs, but no expreſs power is given to diſtrain.

1. Quære. Whether the truſtees can act in this Caſe, without being appointed by the direction of the lord chancellor?

Anſwer. IF the legal intereſt has been regularly conveyed to the preſent truſtees, I think, they may act; but they are liable to be removed, if they have not been appointed by the lord chancellor, as the deed has expreſsly directed.

2. Quære. Whether they can have power to diſtrain, without expreſs affirmative words to that purpoſe, upon the conſtruction of the other words as they ſtand in the deed?

I DO

I DO not find any Caſe that comes up to this; and therefore it cannot be conſidered as a clear point; but I am of opinion, upon the conſtruction of the words above ſtated, that they may diſtrain. Anſwer.

Is there any and what material difference between an incorporated or a non-incorporated charity? and, Are either and which of them capable of taking lands or rents of above the yearly value of 200l. or for leſs time than an abſolute fee, or copyhold lands, or by any other conveyance than by deed inrolled? and, Whether after once bought or given, can they ever be aliened? and, By whom? 3. Quære.

NO opinion can be given upon ſuch a general queſtion; becauſe every different conſtitution makes a different caſe; ſave that as to charities where there is no corporation, I know of no limitation to charitable bounties. But in caſe of incorporated charities, the crown may in the letters patents reſtrain the body to what value the king pleaſes; and it is very commonly provided, that they ſhall not purchaſe above a certain value without the licence of the crown. They are capable of taking one eſtate as well as another, whether it be freehold or copyhold, or for life or years. But ſince the late mortmain act it muſt be by deed inrolled; and the circumſtances of that act muſt be obſerved; but before that act all conveyances uſed in other caſes were good in caſes of charities. Anſwer.

BUT the chief reaſon of aſking this opinion is to know, Whether this 50l. ought to allow the land-tax? In order to that it is apprehended, that the conſideration of the clauſe in the land-tax act, contained in fol. 30. relating to the abatements to be made to the tenant by the owners of rent-charge and annuities, or fee farm or other rents, will be material.

And the clauſe in fol. 46. relating to the allowance of 4s. for fee-farm rents, &c. and the clauſe fol. 47. relating to the non-allowance of 4s. in caſe ſuch allowance ſhould exceed the tax payable for the whole eſtate, will be material.

IT

It is apprehended, that the meaning of the land-tax act by the expreſs words of the preamble, is, that the tax ſhall be as equal as poſſible: in order to effect that, aſſeſſors are appointed in every pariſh, and if they do wrong, an appeal gives the ſame power to commiſſioners; which ſeems plainly to confine the commiſſioners power to original taxation, being only transferred to them from the miſbehaviour of the aſſeſſors.

The clauſes in fol. 30. and 47. relative to ſubproportion, ſeem to be only between party and party, by way of retention or deduction with regard to rents, annuities, and other annual outgoings, over which neither aſſeſſor nor commiſſioner ſeem to have any power or juriſdiction at all; becauſe the king, after being once paid, is unconcerned.

4. Quære. Therefore, Who are the proper judges upon this clauſe? and, Where lies the proper remedy? and, By whom, and againſt whom? and, What is to be deemed an equal or due proportion, as the rent-charge pays nothing, but the land tax and all other outgoings are laid upon the ter-tenant, ſuch as poor rates, conſtable and other rates, window and other taxes, loſs of tenants and other loſſes? Whether all ſuch juſt allowances ought not firſt to be computed and ſet off to the ter-tenant, and then to tax him only for what will remain clear which ſeems the neareſt way of coming at an equal proportion? or rather, Whether fee-farm rents and other chief rents, being mentioned in the ſame clauſe as annuities and rent-charges, ought not to have the ſame conſtruction put on them which by fol. 30. and 47. are required, to allow full four ſhillings in the pound, under a penalty, unleſs that allowance exceeds the land tax payable for the whole eſtate from whence they iſſue; in which caſe, according to fol. 47. they are not; which ſeems conſtructively to relate to that caſe only? and if it ſhould be thought proper to lay the tax on the whole pariſh, in caſe of the charity, Who are then to be made parties, in caſe a bill in equity ſhould be thought proper?

Anſwer. THE regular way is, to tax the land out of which the annuity or rent iſſues, and the tenant of the land is to pay the tax, and deduct it out of the rent in proportion to the value of the land; as if the tax upon the land be three or four ſhilling in the pound, the deduction for the rent (this not being a fee-fram rent to the crown, or perſons claiming under the

crown

crown) muſt be in proportion. If any diſpute ariſe, the queſtion may be determined either by an appeal to the commiſſioners, or the tenant of the land may retain the money; and in any ſuit againſt him for the rent, the court will look upon the proportion which the rent ought to bear to the land tax as a payment, and allow him to deduct the ſame accordingly. Theſe are the only judges in this point relating to rents and annuities. In adjuſting the proportion, it is reaſonable to conſider the value of the land clear of the common ordinary outgoings of church and poor and conſtable's rates, but not the window tax nor loſſes by tenants. All annuities and rents are upon the ſame footing, except fee-farm rents due to the crown, or perſons deriving from the crown (for which four ſhillings in the pound is to be deducted), and except ſuch rents as are expreſsly by the act exempted. But I do not think the rent in queſtion is exempted; and conſequently there is no occaſion to charge the pariſh with it. If it were exempted, I think, it would fall upon the pariſh.

5. Quære. According to clauſe fol. 44. hoſpitals and almshouſes not taxed by the 3 & 4 Will. and Mary are not liable.

This being a partial law, Whether it ought not to receive a ſtrict conſtruction? and if ſo, Whether it is not to be underſtood of incorporated hoſpitals and almshouſes only, who are made capable of purchaſing by the 39 Eliz.? and conſequently, Whether that exemption is not properly cognizable before aſſeſſors and commiſſioners by original taxation? and, Is ſuch exemption to affect all the reſt of the pariſh, or the eſtate of the donor only?

Anſwer. THE act muſt have a juſt and reaſonable conſtruction, according to the true intent and meaning of the words; and if they be hoſpitals and almshouſes, and uſually underſtood as ſuch, I think, they will be within the clauſe, whether they be or be not incorporated. This exemption ought, in my opinion, to be conſidered by the aſſeſſors, or at leaſt by the commiſſioners upon an appeal,

for

for it muſt fall upon the reſt of the pariſh.—See the Anſwer to the next *Quære*.

6. Quære. Is the clauſe fol. 44. with regard to hoſpitals, alms-houſes, and charities to be conſidered any otherway than only as between the king and the pariſh, ſo as either for the king to loſe it or the pariſh to pay it, without any regard to be had to the eſtate of the donor? and, If charities to be created at this day are to be held exempted and unalienable, as ſuch a conſtruction may be made uſe of to ſerve very ill purpoſes with regard to the public?

Anſwer. THE king is not to loſe by the exemption of ſuch hoſpitals and alms-houſes as are mentioned in the act for that purpoſe, but the whole ſum allotted to the pariſh or place muſt be raiſed; and conſequently that exemption will fall upon the reſt of the pariſh, and increaſe their taxes proportionably.

7. Quære. Whether commiſſioners can examine any perſon upon oath?

Anſwer. PRACTICE and uſage might poſſibly have given a ſanction to ſuch a power. But that not having been uſual, unleſs the power had been given by the act to examine on oath, I think the commiſſioners have not ſtrictly a power to do it; but if they ſhould, and the witneſſes ſubmit to it I think, they will not be blamed for it.

July 17, 1746. N. FAZAKERLEY.

WILLIAM

WILLIAM FLEMING tenant in tail, remainder over. William Fleming being a lunatic, no written leaſe was ever made of any part of the eſtate during his life. The tenants held from year to year, under verbal agreements, with a receiver of the ſaid eſtate appointed by the court of chancery.

CASE 2, Whether perſonal repreſentatives entitled to any part of rent due at the deceaſe of tenant in tail?—With OPINION of Mr. C. YORKE and an EMINENT MODERN COUNSEL.

Mr. Fleming's eſtate conſiſted of manors, quit-rents, certain ſmall rents called chantry-rents, farms let at rack-rents, &c.

The chantry-rents and quit-rents, whether reſerved quarterly or half-yearly, were collected only once a-year namely, at Michaelmas O. S. The rack-rents might be reſerved and received quarterly, but all the rents were due and payable by the O.S.

William Fleming the lunatic died 25th December 1766, N. S. and mr. Biſcoe the receiver received the whole quarter's rent for mr. Fleming.

On the Caſe, with mr. Yorke's Opinion left herewith, Whether the perſonal repreſentatives of William Fleming are entitled to a proportionable part of the rack-rents and chantry-rents, or quit-rents, from the 10th of October 1766, the laſt pay-day before his death, to the 25th December 1766, when he died? or, Will the next in remainder be entitled to the whole of ſuch rents from 10th October 1766? Quære.

OPINION of an EMINENT MODERN COUNSEL.

Mr. FLEMING, the preſent owner of the eſtate, cannot claim to take in ſucceſſion under the ſettlement of Ed. Fleming, but he takes an eſtate newly created out of the reverſion by Richard Fleming, brother to the lunatic, and conſequently he had no relation to the eſtate tail of which William Fleming died ſeiſed; but if he had been a remainder man, and William Fleming had made leaſes under the ſtatute of Hen. 8. theſe leaſes would only have bound the iſſue in tail; ſo that in either caſe mr. Fleming could only have recovered, in an action for ſpecial occupation, ſo many days rent as had become but after the commencement of this title. What pretence then can he have to detain the whole quarter's rent that the tenants have

ſubmitted

ſubmitted to pay to his agent or receiver? But even if it had not been paid, I think it might have been recovered againſt the tenants under the proviſions of the ſtatute of 11 Geo. 2. by the repreſentatives of William Fleming; for his eſtate being in the cuſtody of the crown, which gave the court of chancery an authority to demiſe it during the life of the lunatic and no longer, the intereſt of the tenants muſt neceſſarily determine upon his death, when the eſtate ceaſed to be in the hands of the crown. But if he had been in actual poſſeſſion, and not incapacitated by his misfortune, it would have been much the ſame; for at the inſtant of his death he had only an eſtate for life, for then his eſtate determined. This ſtatute has been conſtrued to extend to many caſes within the ſame miſchief, though not within the letter; as tenant for years determinable upon lives has been admitted to be within it; and tenant in tail after poſſibility, &c. has been ſo conſidered. But it has not been ſo expreſsly determined to comprehend the caſe of a tenant in tail, through lord Hardwicke's argument in *Paget and Gee* (which, as I underſtand it, was the caſe of a tenant in tail) goes, a great way in the deciſion of that queſtion. However, that decree was grounded upon another point, which makes it preciſely parallel with the preſent caſe. The remainder man had there received the rent, as mr. Fleming has here; and the court held, as my note expreſſes it, That he ought not to be permitted to detain the money againſt conſcience which the tenants had conſcientiouſly paid him; and therefore decreed, that he ſhould account to the repreſentatives of the tenants in tail for their proportion. Upon this authority (ſorry I am to differ from mr. Yorke), I am of opinion, that William Fleming's perſonal repreſentatives are entitled to an apportionment of all the rents that have been received by mr. Fleming *to* the 25th of December; and that the maſter of the rolls' decree in this cauſe, by which the maſter is directed to apportion them cannot be impeached.

Temple, June 26, 1769. *P.*

THIS

Mr. YORKE's OPINION.

THIS Caſe is laid before me again with a new circumſtance ſtated, extremely material to be taken into conſideration—That the receiver (appointed as I am informed in the lunacy above, and not in any cauſe relative to the caſe of the eſtate, and application of the profits on the equity ſide of the court) has received the Chriſtmas quarter's rent, as well as the rent for the Lady-day quarter, from the tenants, they not inſiſting upon the rule of the common law, that no *rent* was due, becauſe the day of payment was not come; and that the ſtatute of 11 Geo. 2. c. 19. ſ. 15. did not provide a remedy in this inſtance either for the perſonal repreſentatives of a tenant in tail, or entitle the iſſue or remainderman to claim rent for a ſingle day antecedent to the commencement of his eſtate in poſſeſſion: therefore I am of opinion, that a voluntary payment of the rent having been made by the tenants into the hands of the officer appointed by the chancellor, the court will think itſelf bound to decide that payment according to conſcience and natural equity between the adminiſtrator of the lunatic and the next in remainder, allowing a quarter's rent to the *former*, that is to Chriſtmas-day 1766. In this reſpect the decree pronounced by lord Hardwicke in the Caſe of *Paget and Gee* is directly in point. When I anſwered the *Quære* propoſed to me at Whitſuntide laſt, I had no opportunity in the country to reſort to my Notes, and ſpoke of that Caſe from memory. But upon looking into it I find that I was right in ſaying, lord Hardwicke did not determine a *tenant in tail* to be within the ſtatute of 11 Geo. 2. (the words of which he obſerved to be very ſtrict), and doubted much whether the judges of the common law would hold *here* within it. He declared his Opinion, however, that a tenant in tail after poſſibility of iſſue extinct, a tenant in tail jointreſs *ex proviſione viri*, and even a tenant for ninety-nine years, *if he ſo long lived*, were all within it, and muſt be ſo held at law. He added alſo, that

that whatſoever might be the judgment of the courts of law, there was ſtrong ground to contend, when the caſe ſhould ariſe, that the chancery might raiſe an equity upon the eſtate in favour of the repreſentatives of a tenant in tail, where the tenant ſhould refuſe to pay the rent. But the ſole foundation of his decree was the *voluntary* payment by the tenants of the whole rent incurred to the remainder man, who had only a week's intereſt in the half-year's rent ſo paid: and therefore he ſaid, that he would not ſuffer the remainder man to detain againſt conſcience what the tenants had paid into his hands from a principle of conſcience, ſuch remainder man having no right to it, or remedy for it, either in law or equity.

I was not appriſed till I read Mr. *P.*'s Opinion, that the maſter of the rolls had decreed between the parties concerned in this Caſe on the authority of lord Hardwicke's Opinion in the cauſe of *Paget* and *Gee*. Therefore upon the whole matter, and further conſideration, I am ſatisfied that the rents in queſtion paid to the receiver, as the bailiff and officer of the court, ought to be apportioned; and I do concur with Mr *P.* (who has given his Opinion very ably and clearly upon this queſtion), that his *Honour*'s decree is right, and will not be reverſed upon appeal.

July 22, 1769. C. YORKE.

A. is

CASE 3.

The owner in fee of conſiderable landed eſtates in Ireland having contracted to grant a perpetual rent out of the ſame for a valuable conſideration,—the OPINION of Mr. YORKE in what manner the ſame may be beſt ſecured to the grantee.

A. is ſeiſed in fee of eſtates in Ireland of the annual value of 8000l. now in leaſe to different tenants for one, two, and three lives; and were all the leaſes now determined, it is calculated that theſe eſtates would let for 17,000l. owing to the great riſe in the price of lands in that kingdom.

A. ſtands indebted by judgments and otherwiſe to a conſiderable amount; and for the purpoſe of raiſing money to pay his debts he has propoſed to *B.* to ſell and convey to him in fee a part of the ſaid eſtate, of the yearly value of 2000l. for the ſum of 30,000l. and that *B.* ſhould regrant the fee ſimple of the ſame eſtate to *A.* and his heirs for ever, ſubject to the payment of a clear rent of 1500l.; ſo that by this agreement *B.* will have 5l. *per centum per annum* for ever for his money. The conveyance of the 500l. *per annum* over and above the 1500l. is only with a view to guaranty the payment of the latter ſum.

B. has acceded to this propoſal, provided it can be ſo carried into execution that *B.* ſhall have a perfect and complete ſecurity for the rent, and the moſt effectual remedy for obtaining payment thereof; which, as *A.* is a peer of Ireland, it is fit ſhould be as ſummary as poſſible, that *B.* may be ſubject to no difficulties on account of *A.*'s privilege: in ſhort, that the ſecurity may be of ſuch a nature as to render *B.* totally independent of *A.* and his ſucceſſors, and that *B.*'s remedy may be ſo ſevere as to inſure the regular payment of the rent by *A.*

It was firſt intended, that a leaſe for ten thouſand years ſhould be granted to *A.* by *B.* reſerving this rent, with a power of entry, and for making void the leaſe in caſe of failure of payment within a ſtipulated time after entry: but this mode his lordſhip objected to, for theſe reaſons: —Firſt, Becauſe it would deprive him of his manerial and other rights adherent to the freehold: Secondly, Becauſe he would loſe his intereſt in the country, not being able to grant a freehold in the premiſes: and, Thirdly, Becauſe the eſtate which he would take would be perſonal, and not deſcend to his heirs to ſupport the title.

The force of theſe reaſons is admitted; but on the other hand it is doubted by thoſe concerned for *B.* how far he will be ſafe in granting in conveyance in the manner propoſed by *A.*; for if *B.* regrants the land to *A.* in fee, reſerving the rent, he parts with the whole freehold, and his

his intereſt then becomes no more than a fee-farm rent, for which he has the uſual power of diſtreſs and ſale to ſatisfy the arrears, without any further power over the eſtate.—On the part of his lordſhip it is anſwered, That a power of entry may be inſerted in the regrant in caſe of nonpayment of the rent; and that after ſuch entry, if the arrears are not paid within a limited time, his lordſhip's intereſt in the lands ſhall become forfeited, and revert to *B.*; or that a penalty may be annexed, as the payment of double rent or the like.—But on the part of *B.* it is ſaid that as he would part with the fee abſolutely by ſuch regrant, the *proviſo* would not make the ſame conditional, ſo that *B.* might enter and diſpoſſeſs his lordſhip in caſe of nonpayment of the rent; and therefore he would be left barely to the remedy of diſtreſs: and that as to a penalty, it is conſidered as nothing in equity, and at law is diſcountenanced.

Another propoſed mode is, that after the regrant *A.* ſhall demiſe a long term of years to truſtees in truſt for ſecuring *B.* his rent, with power for them to enter upon and ſtand ſeiſed of the premiſes (in caſe of non-payment of the rent) for ſuch term to *B.*'s uſe, without any account to *A.* But this plan is objected to on account of the trouble of an entry and ejectment, and from an idea that a court of equity, on payment of all arrears and intereſt, would order redemption of the term. So that the intended agreement cannot be carried into execution without difficulties to one party or the other, on any of the foregoing plans.

But it is conceived that one of the following plans may anſwer the intereſt and intentions of both parties, *viz.*

Firſt, That the regrant ſhall be made to truſtees, ſubject to the rent-charge of 1500l. *per annum*, in truſt to permit *A.* and his heirs to receive and take the rents and profits of the eſtate to his and their own uſe; and that if the ſaid rent-charge of 1500l. *per annum* ſhall be in arrear for a ſtipulated time, the truſtees ſhall reconvey the eſtate to *B.* in fee, and the rent charge ceaſe, and *A.* ſtand debarred from any further intereſt therein; and in ſuch deed of truſt *A.* and the truſtees ſhall be reſtrained from letting the eſtate at any rent under the preſent value as now leaſed, or for any term longer than three lives; and that on the death of the truſtees the power of appointment of new truſtees ſhall be veſted in *B.* alone; *toties quoties acciderit.* Or,

Secondly,

Secondly, That *A.* ſhall make a grant in fee to *B.* and then that *B.* ſhall execute a leaſe to *A.* for three lives, at the above-mentioned rent, with a covenant to renew to *A.* and his heirs for ever, on payment of a fine of a peppercorn, and all arrears and performance of the covenants in ſuch leaſe, and all manerial rights either reſerved to *A.* by the grant, or demiſed by the leaſe; ſuch leaſe to reſerve full and ſufficient powers to *B.* in caſe of default in payment of the rent; ſo that by one or other of theſe means *B.* may have a full dominion over the eſtate.

The laſt mode is adviſed by mr. Duane, and is approved of by both parties; and as there will be nothing reſerved to *B.* but the rent, which is very improveable, it is conceived that the manerial rights reſerved to *A.* will make up any deficiency of the price from the uſual rate of purchaſe, which in Ireland is in general from twenty to twenty-two years purchaſe of lands which have leaſes on them for lives renewable for ever, the landlords of which lands, and not the tenants, are entitled to all manerial rights, as mines, quarries, &c. This agreement therefore, if it can be carried into execution on the preceding terms, will be advantageous to each party:—to *A.* becauſe his eſtate is very improveable, and he ſaves one *per cent.* intereſt on the money due from him on mortgage, &c. at ſix *per cent.* the purchaſe-money being intended to be applied in diſcharge of the incumbrances:—to *B.* becauſe he has five *per cent.* clear for ever on his money.——But though they are both ſo well ſatisfied with this agreement, yet doubts have ariſen how far it may be carried into execution; for it is ſaid, that equity will relieve in caſe of a forfeiture, on payment of all arrears, intereſt, and coſts; ſo that the eſtate will not become abſolutely veſted in *B.* on non-payment of the rent, which he would wiſh, as that conſideration would urge and impel *A.* to a punctual payment. And it is further ſaid, that this agreement, from its nature, is liable to be reſcinded by a court of equity at the inſtance of *A.* or his heirs hereafter, on payment of the money advanced and intereſt, and can be conſidered only as a loan on mortgage. In anſwer to this it is contended, that the bargain is not colluſive or conditional; and that though the form of the deeds may vary from that of the common grant of a rent-charge, yet that in ſubſtance they are no more; for though a grant of a rent-charge does not paſs the eſtate itſelf, but the thing granted, and on the contrary the deeds in this caſe will paſs the whole eſtate in fee, yet that ſuch fee is ſubject to ſuch

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an intereſt in *A.* that it can appear to be, and certainly is, intended in no other light than for the better ſecuring payment of the rent to the purchaſer; and that there is no real difference as to the party ſelling; and that if a grant of a rent-charge at the ſame price is admitted to be good and irredeemable, a conveyance according to the above plan will be equally ſo.

Your opinion is therefore requeſted,

Quære. Whether this agreement will in any caſe be ſubject to redemption on the above principles? and, What will be the moſt ſure mode of conveyance to ſecure punctual payment of the rent to *B.* and in default thereof to give him an abſolute dominion aver the eſtate? and, How can *B.* guard againſt *A.* or any of his ſucceſſors' privilege as a peer of Ireland, *A.* being willing to do any act to wave it?

Anſwer. The validity of this agreement will depend on the general value and price of lands in Ireland, and particularly on the value of the eſtates in that diſtrict or province where the county of Kerry lies. Many circumſtances muſt weigh in ſuch a valuation, which (I doubt not) have been fully conſidered by *A.* and his agents, as well as by the purchaſers. As the price propoſed for the rent to be ſold amounts to twenty years purchaſe, I preſume that the exception of all manerial rights out of the conveyances, and leaving the abſolute dominion of the lands, with all future improvements, in the power and poſſeſſion of the vendor, are the circumſtances which account for not extending the price to the full conſideration of twenty-two years purchaſe. In this view I am of opinion, that a court of equity will not ſet aſide the contract hereafter, or declare the ſale to be a redeemable intereſt. If the rent ſhould happen to be in arrear, and the legal remedies purſued for recovering it, under the leaſe propoſed, the juriſdiction to controul thoſe remedies (if they ſhould happen to be followed by complaints in equity) muſt be in the chancery of Ireland, where the mode of conveyance propoſed, and the principles of valuation on which the contract

tract for the ſale proceeded, are beſt underſtood. As to the method of carrying the plan into execution, I think that it will be right firſt to reduce the whole into articles, and then to make a grant in fee, with an immediate regrant to *A.* the vendor, his heirs, and aſſigns, for three lives, ſubject to the rent agreed, with a covenant for perpetual renewal to *A.* and his heirs, on payment of a pepper-corn without fine. The perpetual renewal without any fine whatſoever to be paid on the ſeveral renewals, is a circumſtance which favours the valuation and ſupports the contract; eſpecially as the rate of intereſt in Ireland is at ſix *per cent.* *A.*'s inducement is certainly very proper to apply the purchaſe money in diſcharge of bonds and judgments now carrying the full rate of intereſt allowed in that country.

April 27, 1769 C. YORKE.

RECOVERY.

Case 1.
J. C. deviſes his eſtates to his ſon in tail male, remainder over, ſubject to and charged with the payment of 10,000l. to the daughters of his ſaid ſon, in caſe he ſhould have any at the time of his death without iſſue male.—The ſeveral Opinions of Mr. Filmer, Sir D. Ryder, and Mr. Wilbraham, Whether this charge of 10,0000l. could be barred by a common recovery?

J. C. by his will deviſed his eſtates to his ſon *J. C.* in tail, with remainders over; and then follow theſe words: "ſubject nevertheleſs to ſuch jointure or jointures "as ſhall be made by my ſaid ſon John upon any wife; and "ſubject alſo to, and I do hereby charge the ſame with, "the payment of 10,000l. to the daughter and daughters "of my ſaid ſon John, in caſe he ſhall have any at the "time of his death without iſſue male."

Quære.

Can this charge of 10,000l. be barred by a common recovery?

Mr. Filmer's Opinion.

I am inclined to think that a recovery will bar the charge of 10,000l.; but this is not a clear point; and therefore it may be proper to take ſome further advice.

1752. B. FILMER.

Sir D. Ryder's Opinion.

A RECOVERY will, I conceive, bar the 10,000l.; but this is not a clear point and may admit of conſiderable doubt.

D. RYDER.

Mr. Wilbraham's Opinion.

As to the point in queſtion, I have full as much doubt whether the recoveries will bar this equitable charge or not as the gentlemen who have given theſe Opinions ſeem to have; for it is clear to me, that it was the intent of the teſtator that his ſon ſhould take this eſtate tail ſubject to

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this contingent charge of 10,000l.; and though the eſtate tail precedes the charge in words, yet I do not think it does in fact; for he gives the reſt of his manors, &c. ſubject and liable to ſuch mortgages as are at preſent thereon, &c. and to the truſt, charges, and purpoſes of this my will:—and as this is a charge on the eſtate, though it is expreſsly made after the eſtate tail, yet it is in effect made before; for the eſtates are given to mr. *C.* ſubject to this charge, being in effect a prior charge of his will. But whether the charge is barred or not, I think, as it is a mere contingent charge or burthen laid upon theſe eſtates for the benefit of perſons not *in eſſe*; and as this is an equitable charge on the land, and not directed to be raiſed by the truſtees, nor is there any legal eſtate given to them for that purpoſe; and as the event has not happened upon which this charge is to take place, ſo that there are neither *ceſtui que* truſts, nor truſtees who can properly ſuſtain or controvert this queſtion; and as the Opinion that could now be given upon it, were the cauſe properly before the court, could not be any ways binding upon the daughters of mr. *C.* with regard to their claim of this 10,000l. they not being *in eſſe* when the queſtion is agitated; for this reaſon I think, that the lord chancellor would not now determine this queſtion, and could not properly do it upon this or any other bill or ſuit that could now be inſtituted.

R. WILBRAHAM.

Case 2.

14 Feb. 1746. FRANCIS RIGHTON, by his will of this date, devised all his real and personal estate whatsoever, being in the parishes of Marden, Amberley, and Modenham, and elsewhere in the county of Hereford, unto his wife Ann Righton for life; remainder to his two daughters Mary and Ann, and their heirs, equally to be divided between them, share and share alike as tenants in common, and not as joint-tenants; and in case of the death of his said daughters, and failure of issue, before their respective ages of eighteen years, then he devised the said real estates in the county of Hereford to his brother Samuel Righton in fee.

By indentures of lease and release of 9th and 10th January 1766, certain hereditaments are conveyed by husband and wife to *A. B.* to make him tenant of the freehold for suffering a common recovery of the wife's lands. A writ of entry is brought against *A. B.* in November following, returnable *Quind Sancti Martini.* A writ of summons is then issued against the husband and wife returnable *Quin. Sancti Hilarii*, 27th January. The wife dies on 31st January. The Opinion of Mr. Booth upon the validity of this recovery.

On the death of the said Francis, his widow possessed his said real estates, and received the rents thereof during her life, and died about the 22d June 1762; whereupon the said Ann the daughter, upon the death of her said mother, became entitled under the will of her said father, to one moiety of all and singular the messuages, &c. of the said Francis Righton situate within the said parishes of Marden, &c. in the said county of Hereford; and having had by her first husband Charles Patten one son, and by her present husband George Kennedy Murray one daughter, was desirous, with the consent of her then husband the said George Kennedy Murray, to settle the said moiety of the said messuages, &c.; and for that purpose, by indentures of lease and release, bearing date the 9th and 10th days of January 1766, the release of five parts, and made between the said George Kennedy Murray and the said Mary his wife of the first part, Joseph Hodges of the second part, Richard Morgan of the third part, William Chin of the fourth part, and Colin Donaldson of the fifth part, after reciting as above, as well for the purposes therein mentioned as for the docking, barring, &c. of all estates tail, &c. of and in all the hereditaments thereby granted, &c. and for the settling the said premises to certain uses therein expressed, they the said George Kennedy Murray and Mary his wife did grant, &c. to the said Joseph Hodges and his heirs all that one moiety of the several messuages, &c. late the estate of the said Francis Righton deceased, situate in the said parishes of Marden, &c. in the said county of Hereford, to hold unto the said Joseph Hodges, his heirs, and assigns to the intent and purpose, that as well by virtue thereof as of the fine agreed to be levied

before

before the end of Hilary term then next enſuing the date thereof, the ſaid Joſeph Hodges might become a good and perfect tenant of the freehold and inheritance of all and ſingular the ſaid premiſes, in order that a common recovery might be had and ſuffered thereon.

The *dedimus* for the fine was teſted the 8th November, 1765, but no return is therein inſerted, as none is neceſſary in that writ: if it is taken within a year, it is ſufficient.

Covenant teſted 7th November, returnable in eight days of Saint Hilary.

The acknowledgment was taken by the parties on the 27th January following; ſent up by expreſs to London, mrs. Murray being very ill; and the fine was hurried through the offices, but could not get to the king's ſilver office till the 31ſt, on which day it was there left, the preſine and poſt fine having been before paid at the alienation office.

Mrs. Murray, it is ſaid, died on the 31ſt early in the morning.

The writ of entry was teſted 7th November, returnable in fifteen days of Saint Martin.

Summons teſted 21ſt November, returnable in fifteen days of Saint Hilary, 27th January.

Seiſin teſted 30th January, returnable immediately.

Is this fine well levied; or, Can the ſame be vacated? Quære. and, Will a purchaſer or mortgagee be ſafe in purchaſing or lending money under the circumſtances of the wife dying as above?

I THINK the fine is well levied, and cannot now be vacated, as I ſhall mention preſently. But ſuppoſing that there was a ſubſtantial defect in this fine, and it could now be ſet aſide, yet ſtill there would be a good tenant to the *præcipe*, and the recovery muſt be well ſuffered without the help of the fine. In the Caſe of Goodtitle and Bradburne, Comyns' Reports, 564, 565. it is admitted by the whole court, than an huſband ſeiſed in right of his wife may alone make a tenant to the *præcipe*, without his wife by leaſe and releaſe, &c. Here the leaſe and releaſe are dated the 9th and 10th January 1766, and thereby mr. Joſeph Hodges the releaſee, immediately on the execution Anſwer.

of

of theſe deeds, acquired the freehold. The writ of entry that was brought againſt him was returnable on the *Quinden. Sancti Martini*, which was the 26th of November; then the writ of ſummons being returnable *in Quinden. Sancti Hilarii*, which was the 27th of January, and the wife being then alive, and ſhe and her huſband being thereby on that day, or rather on the *quarto die poſt*, which was the 30th, brought in upon the voucher, and vouching over the common vouchee, and the judgment being alſo on that day, or at fartheſt on the *quarto die poſt*, being the 30th of January, that the demandant ſhould recover his ſeiſin againſt the tenant, and that the tenant ſhould recover in value againſt the huſband and wife, and that they ſhould recover in value againſt the common vouchee; and the wife living until the 31ſt January, which was after the *teſte* of the writ of ſeiſin, which was teſted the 30th January, and conſequently after the judgment, I conceive the whole was regular and the entail was well barred. In Shelley's Caſe the writ of entry was returnable in *Octabis Sancti Michaelis*, which was the 17th of October, and was then the firſt return day of Michaelmas Term; and it being for a recovery with ſingle voucher, the recovery paſſed at the bar on the firſt day of the Term, which was the 9th day of October, and yet the tenant in tail died on the morning of that day between the hours of five and ſix; and this recovery was held to be good, and that execution might be ſued againſt the iſſue in tail after the death of ſuch tenant in tail. 1 Rep. 93. 94. &c. Shelley's Caſe See Moor, 137, 138. So that this recovery ſeems to be good without the aid of the fine. In the caſe of Robinſon and Cummons *in Canc.* Hil. 9 Geo. 2. it was the opinion of my lord Talbot, that a huſband ſeiſed in right of his wife could alone by leaſe and releaſe, or by bargain and ſale, make a tenant to the *præcipe*; and this is become the common practice, it being enough to bar an entail in the wife to call in the wife with her huſband upon the voucher.

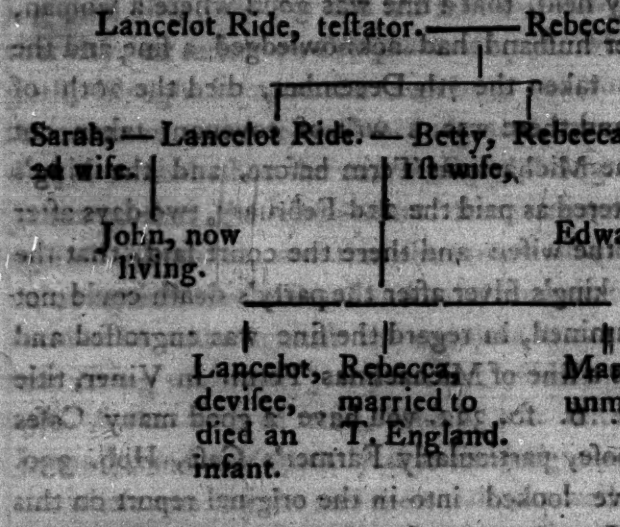
But

But in this case I think the fine too is well levied. In 2 Vent. 48, in the Case of Ball and Cock, it is said (and a case in the Year Books is cited for it), that it is the common course to take the acknowledgment of fines first, and then to sue out a writ of covenant afterwards; and in that case they held, that a fine was good where a woman, who with her husband had acknowledged a fine and the caption was taken the 7th December, died the 20th of February; and there was a writ of covenant taken out returnable the Michaelmas Term before, and the king's silver was entered as paid the 22d February, two days after the death of the wife: and there the court said, that the entering the king's silver after the party's death could not then be examined, in regard the fine was engrossed and completed as a fine of Michaelmas Term. In Viner, title Fine, (F.) b. 6. fo. 332. you have a good many Cases to this purpose, particularly Farmer's Case, Hob. 330. which I have looked into in the original report on this occasion. Here the writ of covenant was returnable in *Octabis Sancti Hilarii*, which was the 20th of January, when the wife was living; and the caption was on the 27th, when she was living; and all is right, the *dedimus* bearing *teste* after the *teste* of the writ of covenant. For these reasons I apprehend there was a good tenant to the *præcipe* by means of the fine.

Lincoln's Inn, } JA. BOOTH.
July 28, 1768.

REMAINDER.

REMAINDER.



12 Auguſt. LANCELOT RIDE the grandfather, being ſeiſed in fee of a ſmall freehold eſtate at Whilton in Middleſex,, made his will in writing, atteſted by three witneſſes, and, *inter alia*, gave and deviſed unto his wife Rebecca all that his freehold eſtate in general in Whilton, not only for the term of her life, but alſo for her to will and diſpoſe of the ſame as ſhe ſhould think fitting, until ſuch times as his two grandſons, Edward Brazier and Lancelot Ride, ſhould arrive at their ſeveral ages of twenty-one years; and then his will and mind was, that his freehold eſtate ſhould go and be divided between them in the proportions in his will directed; that is to ſay, to his grandſon Edward Brazier, and to his heirs and aſſigns, at his age of twenty-one years (provided his ſaid wife be then dead), the new apartments contiguous and adjoining to the farm-houſe, &c.: as for the other part of his freehold eſtate, that is to ſay, the farm houſe, barn, ſheds, outhouſes, and grounds thereunto belonging, with all other appurtenances, he gave and bequeathed the ſame unto his grandſon Lancelot Ride, and to his heirs and aſſigns for ever, when and ſo ſoon as he ſhould have attained his full age of twenty-one years, provided his wife ſhould be then dead, as aforeſaid.

Soon

Soon after making the will, teſtator died, and Rebecca his widow entered into poſſeſſion. Aug. 22. 1649.

Lancelot Ride the grandſon died an infant, leaving two ſiſters, Rebecca and Mary, and his father, living. Jan. 19,

The teſtator's widow continued in poſſeſſion till 1758, when ſhe died without making any diſpoſition of the eſtate. Edward Brazier the grandſon took poſſeſſion of the part of the eſtate which was deviſed to him. Lancelot Ride, the ſon of the teſtator, and father of Lancelot the deviſee, took poſſeſſion of that part of the eſtate which was deviſed to Lancelot the grandſon.

Lancelot the ſon married a ſecond wife, and had a ſon by her and continued in poſſeſſion of the eſtate till his death, which happened in 1768. He has made a will and deviſed the eſtate in queſtion to his wife for life, with remainder to his ſon by his ſecond wife in fee.

The ſiſters of Lancelot the grandſon apprehend, that upon his death, the reverſion in fee expectant upon the death of Rebecca the teſtator's widow, deſcended upon them as ſiſters and co-heirs at law, unleſs the teſtator's will deviſes a fee to his wife, in caſe his grandſon did not arrive at twenty-one.

Whether, on the death of the teſtator's widow, the eſtate in queſtion belonged to the two ſiſters of Lancelot the grandſon, as his heirs at law, or *to Lancelot the father?* Quære.

I AM of opinion, that the remainder in fee veſted in Lancelot Ride the grandſon immediately upon the death of his grandfather the deviſor, and, though he (the grandſon) died within his age of twenty-one years, that it deſcended to his two ſiſters his heirs at law, who upon the death of the teſtator's widow, and expiration of the time when Lancelot the grandſon would (if living) have attained his age of twenty-one years, became entitled to the poſſeſſion of the eſtate. Anſwer.

The widow, in my opinion, had not only an *eſtate for life* in the premiſes, but likewiſe a chattel-intereſt for ſo many years after her deceaſe as the grandſon then wanted (or would have wanted if living) of attaining his full age; and if ſhe died before ſuch time, then ſuch her chattel-intereſt

tereſt went, until that time, to her perſonal repreſentative; but immediately upon her death, and expiration of that term, the whole belonged to the heirs at law of Lancelot the grandſon. This Caſe ſeems to be preciſely the ſame with Boraſton's Caſe, 3 Co. Rep. 19. where it was adjudged in manner as before mentioned.

October 21, 1769. J. BURLAND.

Mr. SERJEANT BURLAND was afterwards requeſted to reviſe his opinion, and ſee the caſe of *Loman v. Holmden*, 3 Wms. 176. and then he wrote—

I HAVE reconſidered this Caſe, and adhere to my former Opinion; which does not ſeem to be contradicted by the diſtinctions taken by ſir J. Jekyll in the caſe above cited: for there, as to the circumſtances of that Caſe, the teſtator certainly only meant that his ſon *perſonally* ſhould not have the eſtate until his age of forty, but gives it to the grandſon immediately after the ſon's death, there being no reaſon inducing him to keep it longer out of the true courſe of deſcent: and ſir J. Jekyll ſays, that where ſuch an eſtate or intereſt is created for a particular purpoſe, there the deviſee or executor ſhall have the land for ſo long time as till the ſon, if he had lived, would have arrived at the age mentioned. Now, in the preſent Caſe, the teſtator meant to give his wife an intereſt which might be more durable than her own life, and which ſhould be tranſmiſſible to her executors, &c.; and therefore he gives it her *until ſuch times* as his two grandſons ſhould arrive at their ſeveral ages of twenty-one years; which expreſſion ſeems to mark his intention (that ſhe ſhould have a power of diſpoſing of the eſtate until the time that they *ſhould* or *might* ſeverally attain ſuch age) more ſtrongly than if he had barely ſaid, *until his two grandſons ſhould arrive at their ſaid ſeveral ages*. And though he does not declare for

for what particular purpoſe he ſo gives it to his wife, yet if it appears to be his meaning, the want of aſſigning a reaſon will not defeat his intention. But all this does not ſeem in the leaſt degree material to the preſent queſtion; which is, Whether or no the ſiſters of Lancelot the grandſon are *now* entitled to, and can recover, the eſtate? And I think clearly that they are ſo entitled; for I think there is no doubt but that the remainder, immediately *on the teſtator's death, veſted* in the grandſon, and, upon his death deſcended to his heirs: ſo that whether they were entitled to the poſſeſſion immediately on the deceaſe of Rebecca the widow, or not until the time of Lancelot's age of twenty-one years, yet (that time being paſt) they are certainly entitled *now*, and may recover by ejectment, unleſs a fine has been levied, and they are barred by their non-claim.

Vid. 2. Mod. 287. 1. Eq. Caſ. Abr. 188. 195. 4. Burr. 228.

October 30, 1769. J. BURLAND.

Ejectment was brought on this Opinion in *C. B.* and tried ſittings after Michael mas 1769, and verdict for plaintiff; and though *Ch. J.* ſaid he would make a Caſe if defendant's counſel choſe it, yet they declined it, and were ſatisfied with the verdict.

Vide Title CONTINGENT REMAINDER.

REPLEVIN.

REPLEVIN.

December 1, 1764. PLAINTIFF removed his goods out of Middlesex into Surrey, to prevent their being distrained.

December 22. Defendant distrained the same for rent due at Michaelmas last.

Dec. 28. Said goods being replevied in the county-court of Surrey, defendant on that day distrained the same again for another quarter's rent due at Christmas then last; which plaintiff again replevied in the same court. Both distresses being made within seventy days from the removal of the said goods, defendant appeared to both replevins, and plaintiff declared in said court.

March 20, 1765. Defendant caused said suit to be removed out of the said county-court into the common pleas.

April 25. The writs of *rec. fac. loq.* were filed, and rules given for plaintiff to declare, which he neglected.

April 30. The writs of *return. habend.* were issued and returned; and on May 23, two writs, in withernam were issued, in eight days of the Holy Trinity. Plaintiff neglected proceeding in said replevin till a few days before the said writs were returnable.

On June 12, plaintiff gave notice of motion to set aside defendant's proceedings with costs for irregularity, in not entering appearances to her own two writs of *re. fa. lo.* which were omitted by the filacer.

June 14. Plaintiff obtained two rules for defendant to shew cause why said writs of *return. habend.* and the several proceedings thereon, should not be set aside with costs; and that in the mean time all further proceedings should be stayed.

June 19. By two rules of court it was ordered, that said two writs of *return. habend.* and the several proceedings thereon, should be set aside; that defendant should immediately enter her appearance; and that plaintiff should declare in both said causes on or before 24th of said June, and proceed to trial at the next assizes to be held

held for Surrey; and that the coſts of the ſaid two writs of *retorn. habend.* and alſo the coſts relating to the applications to the court, ſhould attend the event of the ſame trials between the parties; and on the ſaid 19th June defendant entered appearance to the ſaid two writs of *re. fa. lo.* purſuant to the ſaid rules. On June 24 plaintiff declared; and on July 6 defendant avowed in both the cauſes, and plaintiff was ſerved with two rules for defendant to have leave to make two ſeveral avowries in each; and on July 27 defendant pleaded in bar to one of the ſaid avowries only, to wit, to that on the ſecond diſtreſs made for rent due at Chriſtmas; and as to the cauſe on the firſt diſtreſs, plaintiff admitted defendant was regular; and therefore ſaid he would proceed no further therein.

Auguſt 1. Defendant replied to plaintiff's plea; and on Auguſt 3 plaintiff propoſed to poſtpone the trial of ſaid cauſe, which defendant agreed to, by reaſon her counſel could not then attend.

March 8, 1766. Plaintiff delivered an iſſue, with notice of trial, in the cauſe for goods diſtrained for rent due at Chriſtmas, whereupon defendant delivered briefs to counſel; and on March 17 plaintiff countermanded ſaid notice of trial.

WHAT further ſteps are neceſſary to be taken by defendant, in order to bring theſe cauſes to a final end as ſoon as poſſible? and, Whether the ſheriff will not be liable to anſwer the rent and coſts the defendant has been at, as the plaintiff hath run away from England above a year ago? and as to one of his ſureties he is dead, and the other is gone abroad. Quære.

IN the cauſe wherein the plaintiff hath not pleaded in bar, I think the defendant may ſign a *non proſ.*; and thereon it may be proper to move the court to award a writ of enquiry, according to the ſtat. 17 Car. 2. c. 7. without entering a ſuggeſtion, the defendant having avowed on a diſtreſs for rent; and when the opinion of the court is had upon this, then it will be proper to proceed in the other action in which iſſue is joined: in the mean time, if iſſue is not entered according to the rule given, it will be right to ſign a *non proſ.* in that caſe alſo. OPINION of Mr. HEWIT.

J. H.

I CONCEIVE,

FURTHER OPINION of Mr. HEWIT

I CONCEIVE, in theſe actions the defendant ſhould ſue out ſeverally a writ of *retorn. habend.*; and if the ſheriff returns an *elongata*, as probably he will do (for I do not ſee what elſe he can return), then I think, that ſhe ſhould ſue out a *ſcire facias* to ſummon the perſons whom the ſheriff has returned as pledges, if he has returned any. If no cauſe is ſhewn on this writ, then you ſue out a writ to have a return of the goods of the pledges of the value, &c. If on this writ the ſheriff returns *nihil*, then you may ſue out a *ſcire facias* againſt the ſheriff, grounded upon the ſtatute of Weſtminſter the ſecond, that he render to the defendant as many goods and chattels of the like value of thoſe eloined. The pledges I have been ſpeaking of are ſuch as the ſheriff was bound to take before 11 Geo. 2. and which that act has not excuſed from taking, as I think. If the ſheriff appears to have taken no ſuch pledges as probably is the caſe, then as the ſureties taken in the bond (which I preſume was entered into according to the laſt mentioned ſtatute) are inſolvent, I conceive the defendant may maintain an action upon the caſe againſt the ſheriff; and I adviſe that ſhe ſhould, when ſuch action comes to be brought, declare in three counts; the one, *for not taking the pledges at all*; the ſecond, for *omitting to take any bond*, according to 11 Geo. 2.; and the third, for not taking it from two reſponſible perſons as ſureties, according to the ſame act; and if this cauſe is followed, I think the defendant will come at a ſatisfaction.

May 29, 1766. JAS. HEWIT.

REVERSION.

Case.

A. SEISED of a freehold eſtate, demiſes the ſame to *B.* for twenty-one years; and during ſuch leaſe ſells the inheritance to *D.*; and by leaſe and releaſe, omitting the word *grant*, conveys the ſame to *D.* and his heirs. It now becomes neceſſary for *D.* in point of law to ſupport his title and the ſaid aſſurance.

A. being ſeiſed of lands in fee, demiſes for twenty-one years; and during the term bargains and ſells the lands to *D.* for a year, and then releaſes the ſame to him in fee, by a deed which contains not the operative word *grant*—The ſeveral OPINIONS of Mr. FORD and Mr. BOOTH upon the validity of the conveyance to *D.*

Quære.

Is the reverſion of the ſaid *A.* expectant on the determination of the ſaid term of twenty-one years well conveyed by the ſaid leaſe and releaſe? or, Is the ſaid conveyance void?

Mr. FORD's OPINION.

Mrs. *G.* after the execution of the leaſe (*for twenty-one years*) having only a reverſion in fee expectant upon the determination of the defendant's intereſt, her eſtate lay in grant, and could not legally paſs by any conveyance but what enured by way of grant. The deeds executed to paſs this reverſion were a leaſe and releaſe, which have not, as I apprehend, any operation but where the immediate poſſeſſion is capable of being conveyed. Without an actual entry, no leſſee was capable of a releaſe to enlarge his eſtate by the common law. The ſtatute of uſes executes the poſſeſſion to the uſe; yet I apprehend, that ſtatute takes place only where the leſſee whoſe eſtate is intended to be increaſed was able to enter, which mr. Colt could not do, in reſpect of the prior intereſt veſted in the defendant. I am therefore of opinion that, as a leaſe and releaſe, the conveyance to mr. Col was void; and as a grant, I think, the deed of releaſe could not operate for want of proper words, thoſe uſed being

being peculiar to other conveyances, *viz.* bargain and ſale, and releaſe and confirmation. I think, therefore, that the conveyance to mr. Colt was abſolutely void, and that the reverſion ſtill remains in mrs. G. in whoſe name only an action can be effectually brought.

JOHN FORD.

Mr. Booth's Opinion.

The abilities of the Gentleman whoſe name is mentioned in this Caſe are ſo well known, that too much attention cannot be paid to his ſentiments; but I muſt differ in opinion from him in this Caſe. It is true, that at common law, as to the validity of a releaſe to enlarge the eſtate of a leſſee, there is a difference between the caſe of a releaſe before the entry of a leſſee, and a releaſe after ſuch entry; in the firſt caſe the releaſe is void, in the laſt it is good. The reaſon is, that upon every releaſe there muſt be a prior eſtate diveſted from the eſtate of the releaſor; but in caſe of a releaſe at common law, before entry the leſſee has only an *intereſſe termini*, and not an eſtate, 5 Co. 124.; and then it is an abſurdity to ſay, that the eſtate, of him who really has no eſtate is capable to be enlarged before it becomes a real and actual eſtate; for till entry the leſſor has the whole poſſeſſion, ſo has not any reverſion; but immediately on the leſſee's entry the leſſor has a real and actual eſtate in reverſion, ſevered from the leſſee's eſtate in poſſeſſion, and it is called in the Books a divided reverſion. It is true lord Coke ſays, 1 Inſt. 270. a. that a releaſe cannot work without a poſſeſſion: but he only means, that the eſtate upon which the releaſe is to work muſt be a veſted eſtate, for in the ſame folio he ſays, "If a man make a "leaſe for years, remainder for years, and the firſt leſſee "enters, a releaſe to him in the remainder for years, is good to enlarge his eſtate;" which ſhews his opinion to be, that it is not neceſſary that the eſtate to be enlarged ſhould be an eſtate in actual poſſeſſion, and that it ſuffices if

if it be a veſted eſtate divided from the ultimate reverſion. Then put the caſe, that before the ſtatute of Anne, to take away the neceſſity of attornment, *A.* had made a leaſe at the common law to *B.* for years, and that *B.* had entered, and that *A.* after ſuch entry had granted ſuch reverſion to *C.* for years, and that *B.* had attorned. Doubtleſs that would have been in effect the ſame caſe put by lord Coke; and a releaſe by *A.* to *C.* would have been good to enlarge his eſtate; for there being privity and prior eſtate ſevered and divided from the ultimate reverſion, that would have been ſufficient for the releaſe to work upon for the increaſe of that prior eſtate. It only remains to conſider the operations of the ſtatute 27 Hen. 8. By that ſtatute, wherever any perſon ſtands ſeiſed of any manors, lands, reverſions, &c. to the uſe of any perſon, by reaſon of any bargain and ſale, feoffment, &c. then all perſons that have any ſuch uſe in fee ſimple, fee tail, for life or for years, in remainder or reverſion, ſhall from thenceforth ſtand ſeiſed and be deemed in lawful *eſtate* and poſſeſſion of and in the ſame manors, lands, reverſions, &c. of ſuch like eſtates as they had in the uſe, and the eſtate and poſſeſſion that was in the perſon ſeiſed ſhall be deemed to be in them that ſhall have the uſe. Now every one knows, that the ſtatute of inrolments, 27 Hen. 8. c 16. doth not extend to bargains and ſales for years. Then ſuppoſe, that *A.* at this day makes a leaſe at common law to *B.* for years, and *B.* enters, whereby *A.* then comes to have a divided reverſion; and thereupon *A.* for money bargains and ſells that reverſion to *C.*'s uſe for years; and inſtantaneouſly, by virtue of the ſtatute, the eſtate of *A.* in reverſion is carried over to *C.* for the like intereſt as *C.* has in the uſe which is for years; and ſo *C.* is in of an eſtate in reverſion in the land for years, and that reverſion for years is thereby actually veſted in him; and what is left in *A.*

is the ultimate reverſion in fee, which he may grant over as he pleaſes; and it is a divided reverſion; and no further ceremony is neceſſary to make the eſtate of *C.* in the reverſion for years a veſted eſtate, ſeparate and divided from the ultimate reverſion, than the care, force, and operation of the ſtatute; for upon every conveyance to an uſe the perſon to whoſe uſe an aſſurance is made is in the eſtate conveyed, and that eſtate paſſes to him without any of the legal ceremonies required at the common law. So Co. Lit. 319. if a fine be of a ſeignory to *A.* to the uſe of *B.* and his heirs, *B.* may diſtrain without attornment; becauſe the ſtatute of Hen. 8. operates by transferring the eſtate to the uſe, and ſo he is in by 27 of law; and ſo ſays my lord Coke, *ibid.* it is at this day, ſpeaking before the ſtatute to take away attornments. If a man, by deed indented and inrolled according to the ſtatute, bargaineth and ſelleth a ſeignory, &c. to another, the ſeignory ſhall paſs to him without attornment; and ſo it is of a rent, reverſion, and remainder; and if a man makes a leaſe for life or for years, and afterwards levy a fine to *A.* for the uſe of *B.* and his heirs, *B.* may diſtrain, and have an action of waſte without attornment to the conveyance, becauſe the reverſion is veſted in him by force of the ſtatute, and he hath *no* remedy to compel the tenant to attorn: Co. Lit. *ibid.* So it is of a bargain and ſale for years where inrolment is not neceſſary. To this purpoſe is the Caſe of Lutwich and Miller, Cro. Jac. 604. and 1 Jo. 7. The words are there upon a deed of bargain and ſale for years of lands whereof he himſelf is in poſſeſſion, and the bargainee never entered. If afterwards the bargainor makes a grant of the reverſion (reſpecting this leaſe exceptions upon it) to divers uſes, it is a good conveyance of the reverſion, and the eſtate was executed and veſted in the leſſee for years by the ſtatute, and was divided from the reverſion; and not like a leaſe for years at the common law; for in that caſe there is not any apparent leſſee

until

until he entered; but here by the operation of the ſtatute, it abſolutely and actually veſts the eſtate in him as the uſe, but not to have treſpaſs without entry: and with this agrees the Sixth Reſolution in the caſe of Iſcham and Mortice, Cro. Car. 109. upon a ſingular caſe, where the leſſee ſhall be adjudged to be in actual poſſeſſion under a bargain and ſale for years, by force of the ſtatute of Hen. 8. of uſes, and the reverſion is immediately divided from the poſſeſſion, and he hath a good reverſion, although there be no proof that the leſſee or bargainee entered. But in caſe of a leaſe for years at the common law, the Book ſays, that until the leſſee enters, or the leſſor waives the poſſeſſion, the reverſion is not divided, nor paſſeth by the words of grant of a reverſion. I have ſaid enough to prove that in the preſent Caſe, by the bargain and ſale of the 2d June 1741, made by mrs. *G.* mr. *G.* and Colt had an actual veſted eſtate for a year in the reverſion expectant on Manning's leaſe; and that eſtate for a year was capable of being enlarged by the releaſe of the 3d of June 1741, from mrs. Grove to mr. Colt, there being ſufficient privity between him and mrs. Grove; who immediately upon the execution of the bargain and ſale, or leaſe, of the 2d of June 1741, became intitled to the ultimate reverſion, divided from the eſtate for a year conveyed to mr. Colt. The Caſe in lord Coke, mentioned by me before, proves it plainly. Leaſe for years, remainder for years, the firſt leſſee enters, a releaſe to him in the remainder for years is good to enlarge his eſtate: as does the Caſe, *ibid.* 273, if a man makes a leaſe for years, the remainder for life, a releaſe by the leſſor to the leſſee for years is good, for that he hath both privity and an eſtate; and the releaſe made to him in the remainder for life and his heirs is good. Wherefore I conclude, that it is not neceſſary for the eſtate that is to be enlarged, to be an eſtate in actual poſſeſſion; and if it were,

ſcarce one conveyance by leaſe and releaſe in an hundred would be good at this day. But though, in this Caſe I differ from the Gentleman whom I have mentioned before, yet I doubt whether this bargain and ſale and releaſe of the reverſion be well ſet forth in the declaration. As the declaration is ſtated in this Caſe it alledges, that mrs. Grove was ſeiſed, and leaſed to Manning, who entered and was poſſeſſed; and that Manning being ſo poſſeſſed, and mrs. Grove being ſo ſeiſed of the reverſion, ſhe on the 3d of June, by the before-mentioned indenture of releaſe, granted her reverſion in the premiſes mentioned unto and to the uſe of the ſaid Colt and his heirs, and to this Manning, after oyer of the leaſe has demurred: and, I think, the demurrer will be good if you do not amend. Had the leaſe and releaſe amounted to a grant of the reverſion, or had the word *grant* (often very unſkilfully ſtruck out of conveyances) been in the releaſe of the inheritance thereof, a grant ſeems not to be the right way of pleading. It is a rule, that every man muſt plead in that order which is agreeable to the rule of law. Tenant for life, and he in the remainder in fee, make a leaſe for years by a deed indented; the leſſee being ejected declared upon demiſe made by tenant for life and the remainder man; and adjudged againſt the plaintiff; for, living the tenant for life, it is only the leaſe of the tenant for life, and the confirmation of the remainder man; and he ought ſo to have declared: 1 Inſt. 456. Lade *v.* Baker. A deed that had the words give and grant, aſſign and transfer, was ſo pleaded; but further alledged, that it appeared by way of covenant to ſtand ſeiſed. It was held, that the latter part was impertinent; and that it ought to have been pleaded as a covenant to ſtand ſeiſed, which was the real effect and operation it had in point of law. 2 Vent. 260, 261. Lade *v.* Baker. 3 Lev. 291. 4 Mod. 149. S. C. But in this I ſubmit to the pleaders.

N. B. Mr. Ford changed his Opinion, the declaration was amended, and they got judgment.

JAS. BOOTH.

N. B. In

N. B. In Term 4 Eliz. it was held by all the judges, that if a man ſeiſed of lands in fee makes a leaſe thereof for years, and after by deed indented bargain and ſell them to the leſſee and his heirs, without any word of gift or grant expreſſed in the deed, that in this caſe nothing paſſed by the deed, unleſs it be inrolled; for without this the frank-tenement paſſeth not; and this is no confirmation: and if, after the ſtatute 1 Rich. 3. *ceſtui que uſe*, by words of bargain and ſale only, had ſold the land to a ſtranger, no poſſeſſion had paſſed by this to the vendee but the uſe only. Moor Rep. 34. Shep. Counſ. 287.

SURRENDER of COPYHOLDS.

Case 1.

The plaintiffs in a bill of injunction against committing waste in their manor, having obtained a perpetual injunction, and a large sum being reported due to them from the defendant for damages and costs—The several OPINIONS of Mr. MURRAY and Mr. YORKE, Whether the plaintiffs were compellable to accept a surrender from the defendant of his copyhold lands within the manor, to the use of a trustee under a voluntary conveyance, for the payment of particular creditors, in exclusion of others, until payment of the costs and damages reported due to themselves.

BY indentures of lease and release, dated respectively 11th and 12th January 1744, and made between Brittain Warren of the one part, and Thomas Warren of the other part, reciting, that said Brittain Warren stood indebted unto Henry Young in the principal sum of 800l. besides an arrear of interest due upon bond given by said Brittain Warren, and Thomas Warren, party thereto, and William Warren, his two brothers, and sureties to the said Henry Young, and unto Everson, in the principal sum of 200l. with an arrear of interest, upon a mortgage made of some part of the premises in the said indenture of release mentioned; and unto Robert Crow in the principal sum of 300l. and about two years interest for the same, upon a mortgage or mortgages, or some other lien or incumbrance upon the messuages, lands, &c. therein mentioned, or some part thereof; and also unto Thomas Warren, party to the said indenture of release, in the principal sum of 200l. besides interest, for money lent by the said Thomas Warren to the said Brittain Warren, and for payment thereof said Thomas Warren hath six several promissory notes under the said Brittain Warren's hand: and further reciting, that said Brittain Warren was willing and desirous that all his messuages, lands, tenements, and hereditaments, as well copyhold as freehold, should be sold forthwith, and be disposed of, for the more speedy and effectual paying and discharging the said principal sums due, from time to time, as aforesaid, amounting together to the sum of 1800l. and the interest then due, or thereafter to grow due, for the same; and all other his debts, which are a lien or incumbrance upon the premises therein directed to be sold: it is thereby witnessed, that the said Brittain Warren, as well in consideration of the premises as of 5s. to him paid by said Thomas Warren, did grant, bargain, sell, alien, release and confirm, unto the said Thomas Warren in his actual possession, by virtue of a bargain and sale to him thereof made, and to his heirs, ALL that

that meſſuage or tenement and farm then in the occupation of ſaid Brittain Warren, with all houſes, &c. ſituate in Swatham Prior, or Great Swatham, in the county of Cambridge; and alſo all that meſſuage or tenement and farm then in the occupation of Thomas Fuller, with all houſes, &c. ſituate in Swatham Prior aforeſaid; and alſo all thoſe three cottages or tenements in Swatham Prior aforeſaid then in the ſeveral tenures of Lambert Sparke, William Carter, and Thomas Flank; and alſo all that meſſuage or tenement, and all the lands, meadows, paſtures, and feedings, &c. thereunto belonging, ſituate in Swatham Bulbeck, otherwiſe little Swatham, in the ſaid county of Cambridge, then in the tenure of Thomas Green; and alſo all that cottage, with the appurtenances, in the tenure of Robert Fabb, lying near to the ſaid laſt mentioned meſſuage or tenement; and alſo all that meſſuage or tenement and farm then in the tenure of Cornelius Green the younger; and all the houſes, &c. ſituate and being in Bottiſham, in the ſaid county of Cambridge; and all other the meſſuages, lands, &c. of him the ſaid Brittain Warren, ſituate in any of the before-mentioned places, or elſewhere in the ſaid county of Cambridge; and the reverſion and reverſions, remainder and remainders, rents, iſſues, and profits thereof; and all the eſtate whatſoever of him the ſaid Brittain Warren, in or to the ſame: to hold all ſuch, and ſo much of the meſſuages, farms, &c. therein before mentioned, as are freehold or charterhold, with the appurtenances, unto the ſaid Thomas Warren and his heirs, to the only uſe and behoof of the ſaid Thomas Warren, his heirs and aſſigns for ever, upon the truſts, and to the intents and purpoſes thereinafter declared: and to hold all ſuch and ſo much of the ſame meſſuages, farms, lands, &c. as are copyhold or cuſtomary, with their appurtenances, unto the ſaid Thomas Warren, his heirs and aſſigns, at the will or wills of the lord or lords, lady or ladies, and according to the cuſtom or cuſtoms of the manor, or reſpective manors, whereof ſuch copyhold premiſes are holden, upon the truſts, and to the intents and purpoſes therein-mentioned; (that is to ſay), upon truſt that the ſaid Thomas Warren, his heirs or aſſigns, did and ſhould, with all convenient ſpeed, ſell and make ſale of all and ſingular the ſaid meſſuages, farms, lands, &c. either together or by parcels, for the beſt prices that could be gotten for the ſame; and that he and they ſhould apply the

the money ariſing by ſale of the ſaid premiſes, and the rents, iſſues, and profits thereof until the ſame ſhould be ſold, firſt, in paying and reimburſing him and themſelves all ſuch ſum and ſums of money as he or they ſhould expend or diſburſe in execution of the truſt thereby in him or them repoſed; and afterwards in paying off and diſcharging the therein-mentioned principal ſums due and owing from ſaid Brittain Warren to the ſaid ſeveral perſons therein-mentioned upon the ſeveral ſecurities aforeſaid, amounting together to the ſaid principal ſum of 1800l. and of all intereſt due or to grow due for the ſame: and alſo all other the debts and incumbrances of the ſaid Brittain Warren which were a charge or lien upon the premiſes thereby directed to be ſold as aforeſaid, or which affected the title thereof, in and according to ſuch priority, order, and form, as by law ſuch debts and incumbrances ought to be paid and ſatisfied; and that he and they did and ſhould pay the overplus thereof (if any) to the ſaid Brittain Warren, his executors or adminiſtrators: and upon this further truſt, that the ſaid Thomas Warren ſhould and might, until the ſaid meſſuages, &c. ſhould be ſold, let leaſes of any part thereof, for any term of years not exceeding twenty-one, to commence in poſſeſſion, and ſo as the accuſtomed annual rent or rents ſhould be reſerved by half-yearly payments. And the better to enable the ſaid Thomas Warren to ſell and convey the copyhold part of the therein-mentioned premiſes, and to perform the ſaid truſts, he the ſaid Brittain Warren did make, ordain, conſtitute and appoint, the ſaid Thomas Warren, his true and lawful attorney, irrevocably for him, and in his name, to ſurrender all and ſingular his copyhold meſſuages, &c. into the hands of the lord or lords, lady or ladies, of the manor or reſpective manors whereof ſuch copyhold lands and premiſes are holden, either in court or out of court, by the hands of ſuch lord or lords, lady or ladies, or their reſpective ſtewards, or any wiſe howſoever according to the cuſtoms of ſuch manor or manors, to the uſe of any perſon or perſons, purchaſor or purchaſors, and for ſuch eſtate and eſtates, as the ſaid Thomas Warren, his the ſaid Brittain Warren's ſaid attorney, ſhould think fit. In which ſaid indenture of releaſe the ſaid Brittain Warren covenants with ſaid Thomas Warren, that he would not revoke the authority thereby given to ſaid Thomas Warren, and that he ſaid

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Brittain Warren would execute any act whatſoever for further aſſurance.

Whether the above recited deed was fairly executed on the day it bears date, and the witneſſes indorſed their names on the back thereof in atteſtation of it at the time of the execution, is uncertain; but it is admitted, that the ſame was voluntarily done, with a deſign to prefer the ſeveral creditors therein named to ſome others that are not named.

In Chancery.

Between { Peter Allix, D. D. Dean of the Cathedral Church of the Holy and Undivided Trinity of Ely, and the Chapter of the ſame Church, PLAINTIFFS: AND Brittain Warren, and Frances his wife, DEFENDANTS.

The plaintiffs and their predeceſſors, for many years, have been ſeiſed of the manor of Swafham Prior in the county of Cambridge in their demeſne as of fee in right of the ſaid church; and, being ſo ſeiſed, did at their court-baron, holden at their ſaid manor 1ſt May 1723, before Samuel Gatward, eſq. then ſteward thereof, by a copy of court of ſaid manor, according to the cuſtom thereof, by ſaid ſteward, grant unto Frances Waters, then an infant, ſeveral parcels of fen or marſh ground, to hold to her and her heirs of the lords of the ſaid manor, at the will of ſaid lords, according to the cuſtom of ſaid manor, by the ſeveral rents and ſervices thereupon due, and of right accuſtomed by copy of court-rolls of ſaid manor; by virtue of which grant ſaid Frances Waters did enter into ſaid ſeveral parcels of fen or marſh ground, and was ſeiſed thereof in her demeſne as of fee, at the will of the lords of ſaid manor.

The ſaid Frances Waters, being ſo ſeiſed, intermarried with the defendant Brittain Warren; by virtue whereof defendants Brittain Warren and his wife were, and ever ſince had been, ſeiſed of ſeveral parcels of fen or marſh ground and premiſes, in right of ſaid Frances, at the will of the lords of ſaid manor, according to the cuſtom thereof; and defendant Brittain Warren, ever ſince ſuch intermarriage, and by virtue thereof, has been in poſſeſſion of ſaid

ſaid premiſes, or received the rents and profits thereof to his own uſe.

The defendants having ſince 14th May 1736 dug from off the ſoil of ſaid premiſes, or ſome part thereof, 200,000 turves and upwards, and ſold or agreed to ſell ſame, whereby they had committed great waſte on ſaid premiſes, and threatening to dig up the whole ſoil, and deſtroy the herbage thereof, the plaintiffs filed their bill, praying that ſaid defendants might be reſtrained from committing or doing any ſuch waſte and ſpoil of ſaid copyhold premiſes, ſo holden of plaintiffs ſaid manor, by cutting the ſoil, or digging up or carrying away any ſuch turves as aforeſaid, by injunction of this court; and might account with plaintiffs for ſaid turves ſo cut and carried off as aforeſaid, and make plaintiffs ſatisfaction for the ſame, and for ſuch waſte and ſpoil ſo committed as aforeſaid.

To which bill the defendants put in ſeveral anſwers, and plaintiffs replied thereto; and ſeveral witneſſes having been examined on both ſides, and publication duly paſſed, ſaid cauſe came on to be heard before my lord chancellor on the 1ſt, 2d, and 3d June 1741, when it was ordered, that the parties ſhould proceed to a trial at law, at the then next Lent aſſizes to be holden for the county of Cambridge, upon the following iſſues:—

"1ſt, Whether the ſeveral ancient copyhold tene-
"ments called Peachey's, Maſter's and Waller's, men-
"tioned in the pleadings in ſaid cauſe, or any and which
"of them, or any and what part thereof, were fen or
"marſh grounds before the making the determination or
"judgment of 26th September 1682, in ſaid pleadings
"alſo mentioned?" and,

"2dly, Whether by the cuſtom of ſaid manor of
"Swafham Prior, and for time immemorial, the ſeveral
"copyhold tenants of copyhold tenements parcel of ſaid
"manor, had or have a right to dig turf in the fen or
"marſh ground parcel of their copyhold tenements, and
"to carry away and diſpoſe of the ſame at their will and
"pleaſure? In which iſſues the defendants in this court
"were to be plaintiffs at law, and the plaintiffs in this
"court were to be defendants: and all further directions
"were reſerved until after ſaid trial."

May 10, 1742. Before ſaid trial, or any further proceedings were had, defendant Frances Warren died; and defendant Britain Warren claiming the inheritance of ſaid premiſes, by virtue of a ſurrender made by his ſaid wife and him to the

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uſe of her will, and by virtue of ſuch will defendant Brittain Warren having been admitted thereto accordingly, the plaintiffs filed their bill of revivor againſt the defendant Brittain Warren, and he put in his anſwer thereto, and ſaid ſuit was revived againſt defendant Brittain Warren.

It was ordered, that the parties ſhould proceed to a trial at law at the then next Lent aſſizes for the county of Cambridge, upon the ſaid former iſſues; in which iſſues the defendant Brittain Warren was to be plaintiff at law, and the plaintiffs here were to be defendants. Nov. 8, 1743.

The defendant Brittain Warren not proceeding to try the ſaid iſſues,

It was ordered, that ſaid defendant Brittain Warren ſhould proceed to the trial of the ſaid iſſues at the then next aſſizes for the ſaid county; or, in default thereof, that ſaid iſſues ſhould be taken *pro confeſſo*. June 20, 1744.

The ſaid defendant not proceeding to try the ſaid iſſues, according to the laſt order,

It was ordered, that the ſaid iſſues ſhould be taken *pro confeſſo*. Oct. 23, 1744.

This cauſe coming on to be heard before my lord chancellor on the equity reſerved, it was ordered, that a perpetual injunction ſhould be awarded under the ſeal of the court, to reſtrain the defendant, and all perſons claiming under him, his workmen, agents, and ſervants, from digging or cutting turf upon the premiſes in queſtion; and that it be referred to maſter Sawyer to take an account of the turf dug or cut by the defendant, or by any other perſon by his order, or for his uſe, from off the ſaid premiſes: and what upon the balance of ſaid account ſhould be found due from ſaid defendant to plaintiffs, it was ordered and decreed, that ſame ſhould be paid by ſaid defendant to plaintiffs: and it was further ordered, that ſaid defendant ſhould pay unto the plaintiffs their coſts at law, and in this court, to this time, to be taxed by the ſaid maſter: and his lordſhip did reſerve the conſideration of the ſubſequent coſts till the ſaid maſter ſhould have made his report, when the parties ſhould be at liberty to apply to the court for further directions, as there ſhould be occaſion. Mar. 18. 1744.

The maſter by his report certifies, that in purſuance of ſaid decree of 18th March 1744, he had proceeded to take an account of the turf dug or cut by the defendant, or by any other perſon by his order, or for his uſe, from off the premiſes in queſtion; and that he found by the depoſitions taken in this cauſe, that the defendant, or ſome perſon or July 31, 1746.

perſons

persons by his order, and for his use, had, at several times, dug or cut off the same premises divers quantities of turves amounting to 200,000 in all, and that the same were worth 4s. each 1000, amounting in the whole to the sum of 40l.; and that he had taxed the plaintiffs costs at law, and in this court, to the time of said decree of 18th March 1744, at 344l. 11s. 1dh. which said 344l. 11s. 1dh. being added to said 40l. make together in the whole 384l. 11s. 1dh. which is to be paid by said defendant to plaintiffs, as the same decree directs.

Dec. 9, 1746. The said report was absolutely confirmed.

The defendant then absconding and secreting himself, the dean and chapter did not think proper to set down cause for a further hearing on the master's report; neither has the same been further heard; neither has any part of the 384l. 11s. 1dh. been paid by the defendant to the plaintiffs: but

June 24, 1752. Writ of execution issued, directed to said Brittain Warren, to perform, fulfil, and execute, all and every the matters and things specified and contained in the said recited orders and reports, so far as the same any way concern him, according to the tenor and true meaning thereof.

March 1, 1753. An order was obtained, that service of the writ of execution on defendant's clerk in court should be good service; whereupon his clerk in court was duly served therewith, and demand then made of said 384l. 11s. 1dh. and process of contempt has been since duly issued for the non-payment thereof, and carried on by attachment, proclamation, commission of rebellion, and to a sequestration, which last writ was tested 21st May 1754.

May 31, 1754. Possession was taken of the premises in the following manner, to wit, William Mott, one of the sequestrators, went to Bottisham; where defendant Warren's tenant at 28l. a-year not being at home, said sequestrator left his business at the tenant's house, and saw the tenant afterwards, who promised him he would pay no more rent to any person without consulting said sequestrator.

The same day said William Mott, and Peacock Richard, another of the sequestrators, entered into a messuage, close, and another small cottage, at Swafham Bulbeck, rented by Thomas Green and John Hubbard at 8l. 4s. 6d. a year together, and gave their wives notice to pay no more rent to defendant, or any of his agents.

The same day the said William Mott, and Richard Eaton, another of the sequestrators, entered on a farm occupied

cupied by Thomas Preſton at 53l. 10s, *per annum*, and alſo another farm occupied by Thomas Fuller at 17l. 19s. *per annum*; alſo a cottage occupied by Sarah Richman at 1l. 8s.; alſo a lime kiln occupied by Thomas Adam at 2l. 2s.; and gave them all the like notice.

Brittain Warren ſurrendered into the hands of the lord, out of court, according to the cuſtom, all his meſſuages, lands, tenements, and hereditaments, held of ſaid manor, with their appurtenances, to the uſe of James Dover, his heirs and aſſigns, for ever, ſubject to redemption on payment of 200l. on 17th April then next, at the dwelling-houſe of Nicholas Everſon in Thetford. Oct. 17, 1743.

There are no other entries in the court-rolls of Swafham Prior ſave as above; and you will pleaſe to obſerve, that the plaintiffs are the lords of that manor, and that the bill in this court is brought for waſte committed on ſaid copyhold premiſes, which among others are aſſigned to Thomas Warren by the above indenture of 11th and 12th January 1744, without any ſurrender made to ſuch uſes.

By the agreement above-mentioned power has been given to Thomas Warren, the defendant's brother, to ſell forthwith; but he has not proceeded to the ſale thereof, though ten years have ſince elapſed.

Whether the above-recited leaſe of 12th January 1744, which was calculated to give preference to particular creditors in prejudice to all others, can defeat the plaintiffs of their poſſeſſion, under the ſequeſtration, of all or any, and which of the premiſes in queſtion? and, Whether the ſequeſtration does or can put any ſtop to the exertion of that power veſted in Thomas Warren (as attorney of Brittain Warren) to ſurrender the ſame for any uſes he ſhall ſee fitting? 1. Quære.

THE validity of the deed of the 12th January 1744 depends upon the queſtion, Whether it be fraudulent? which it clearly is, if the debts are not *bonâ fida* due. Though the debts are due, yet the conveyance was by covin, with intent to defeat the plaintiffs, who then had got an order to have the iſſues taken as confeſſed, and to favour Brittain Warren, it may be deemed fraudulent and void. But as to this, no caſe is ſtated. So far as the debts were by former mortgages lien upon the eſtate before, the conveyance muſt be good. Opinion of an eminent Lawyer.

W. M.

Whether

a. Quære.

Whether an equity will not arise in favour of the plaintiffs, as being lords of the manors whereof the said copyhold premises are parcel, and where the waste has been committed, and no surrender thereof made to the use of said Thomas Warren? and, What other methods can be taken, if plaintiffs should be defeated of their sequestration?

I THINK an equity may arise in favour of the plaintiffs, as being lords of the manors, &c. if they can seize as forfeited on account of the waste done. I think a court of equity would not relieve but upon payment of the money reported due. I incline to think, too, that a court of equity would not compel them to admit upon a surrender, until they have received satisfaction.

But under the sequestration the plaintiffs will be entitled to the profits; and therefore I think, they should put those who claim under the deed of 1744, or prior mortgages, to come in *pro interesse suo*, and see what account they give: and as the trustee was, by the said deed of 1744, to receive the rents and profits, if he has never been in possession, it will be a strong circumstance against the deed. The conveyance being to his brother, is another material circumstance, which makes it adviseable to have the transaction examined into.

August 12, 1754. *W. M.*

Mr. Yorke's Opinion.

I THINK the conveyance of January 1744, in trust for particular creditors, will not defeat the plaintiffs of their sequestration in respect of the copyhold lands, as no surrender has ever been offered or accepted upon that conveyance before the sequestration taken out. The plaintiffs, as lords of the manor in which the copyhold premises lie, might have entered for a forfeiture on account of the waste committed; and though they have chosen another remedy, by way of account and perpetual injunction

(which

(which rather admits the title of the defendant to be ſtill a copyholder, and may amount to a waiver of the forfeiture, and of any right to proceed for a ſeizure), yet I am of opinion, that in caſe *T. W.* as attorney to Brittain Warren, ſhould offer to ſurrender the lands (by virtue of the deeds of January 1744) to the uſe of another perſon, in order to defeat the ſequeſtration, the lords of the manor may refuſe to accept it, till the demand is ſatisfied for waſte committed: the conſequence of which will be, that *T. W.* and the defendant Brittain Warren (if they think fit) may bring their bill, in order to compel an acceptance of the ſurrender. The preſent plaintiffs may then ſet forth the nature of the caſe by their anſwer, That this deed was executed only two months before the decree upon the equity reſerved, and is now colourably ſet up, ten years after the execution of it, to defeat the ſequeſtration. I am likewiſe of opinion, that the ſame defence may be made in reſpect of the other lands upon which the ſequeſtrators have entered, becauſe I do not know that the court of chancery has ever ſuffered a truſtee for particular creditors who has not entered, or a mortgagee who has not foreclоſed or is in poſſeſſion, or a judgment creditor who has not extended the lands by *elegit*, to come in and defeat the poſſeſſion actually obtained under a ſequeſtration, in conſequence of a decree eſtabliſhing the demand of a plaintiff in equity.

C. YORKE.

Auguſt 3, 1754.

W. BEING

CASE 2.

W. being seised in fee of copyhold lands in different manors surrenders them to the use of his will and devises the same to *J. C.* in fee, and dies. *J. C.* is admitted to part of the premises, and surrender the same to the use of his will. He afterwards devises the whole of the lands to *W. C.* his youngest son, in fee, and dies, leaving two sons; *T. C.* his heir at law, and the said *W. C.* *T. C.* is admitted, as heir at law of *J. C.* to all the copyholds, and mortgages the same to *J. L.* without notice of the will.—The opinion of Sir Dudley Ryder, Whether a court of equity would supply the want of the admission of the testator, and his surrender to the use of his will in favour of the younger son against the mortgagee?

W. BEING seised in fee of divers copyhold lands and tenements in ———, holden of five several manors, and having surrendered the same to the use of his will, by his will devises all the said premises to *J. C.* in fee.

J. C. the devisee survives the testator, and is admitted to such part of the said premises as holds only of one of the manors, and surrenders the same to the use of his will; but before his admission to any of the copyholds holden of the other manors dies, leaving two sons, *T. C.* and *W. C.* besides daughters.

After his death, *T. C.* the eldest son, according to the custom of the several manors, was admitted, *as heir at law to his father*, to the several copyholds to which his father *was not admitted*; and was also admitted, *as heir at law*, to the lands holden of that manor to which his father had been admitted; and by virtue of such admissions *T. C.* continued in the peaceable possession of all the said premises for several years, and received the rents and profits thereof to his own use.

About five years since *T. C.* borrowed of *J. L.* a large sum of money; for securing the payment whereof, with interest, *T. C.* passed conditional surrenders of all the copyhold lands and premises unto the said *J. L.* *T. C.* afterwards becoming insolvent, and not keeping down the interest of the money advanced, *J. L.* the mortgagee was admitted on the several forfeited conditional surrenders, and is now in possession of all the said premises.

W. C. the youngest son now sets up a will of the said *J. C.* the father, and thereby claims a right to the said premises, being (amongst others) devised to him in fee by his father's will, at his age of twenty-one, he being now upwards of twenty-five; and though his title under the said will accrued several years since, yet he never claimed any interest in the said premises until after the admission of *J. L.* the mortgagee; but now threatens to disturb the possession of the said *J. L.* by filing a bill in equity for the recovery of such of the copyholds devised to him, to which his father was not admitted, and bring his ejectment for the recovering of the possession of such part of the copyholds to which his father had been admitted, without making any recompence or satisfaction to *J. L.* the mortgagee, who honestly advanced the money, *without any fraud or deceit*, and *without any notice* of any such

ſuch will, till within a few days paſt, *J. L.* always *ſuppoſing J. C. died inteſtate, as the eldeſt ſon was admitted to theſe copyholds as heir at law.*

Could *J. C.* deviſe any of the copyholds *before his admiſſion*, though for the benefit of a younger ſon? and, What intereſt has the ſaid *W. C.* under the ſaid will, as well in the copyholds to which his father was not admitted, as to thoſe of that manor to which his father was admitted? Can *W. C.* by bill in equity, ejectment, or how otherwiſe, recover the poſſeſſion of any part of the ſaid copyhold premiſes from the ſaid *J. L.* the mortgagee in poſſeſſion, *for a valuable conſideration*, and *without notice of the will*, without firſt paying the ſaid *J. L.* the mortgagee his principal money, intereſt, and *charges of his admiſſion*, the legal eſtate being now in *J. L.* who was admitted under the aforeſaid forfeited conditional ſurrenders, and now in the poſſeſſion of all the ſaid premiſes? Quære.

T. C. COULD *not* deviſe *legally* the copyhold to which he was not admitted, either to his younger or to any other perſon; *but he might deviſe it to a younger ſon equitably*, ſo as to entitle him *to the benefit of it in equity* againſt the *heir*, but not a *purchaſer from the heir without notice of the will*; therefore *W. C.* cannot recover by any means this eſtate from the mortgagee without payment of the principal and intereſt: and it is the ſame with reſpect to the copyhold to which the father was admitted, but did not ſurrender to the uſe of his will. As to any parts, if there are any, to which the father was admitted, and did *ſurrender them to the uſe of his will*, *W. C.* may *recover them at law by ejectment, without paying the mortgage money, and W. C. be entitled to them in fee.* Anſwer.

1748. D. RYDER.

Case 3.

1753.

J. W. deviſed certain copyhold hereditaments to *A. B.* and *C.* and their heirs, in truſt for *C. P.* for life; remainder in truſt for the firſt and other ſons of *C. P.* in tail male; remainder over. The teſtator dies; and afterwards *A.* and *B.* die.—The Opinions of Mr. Green and Mr. Booth, whether *C.* the ſurviving truſtee may, without a breach of truſt, ſurrender the copyholds to the uſe of the deviſees of the equitable eſtate, according to the will?

JOHN WHITE by his will *(inter alia)* gave and deviſed to *A. B.* and *C.* and their heirs, all his manors, lands, &c. as well freehold as copyhold, to hold to them and their heirs, upon the truſts therein mentioned; and *inter alia* in truſt for Charles Philips, ſon of Charles Philips, and *W.* for life; remainder in truſt for Charles (the ſon's) firſt and other ſons in tail male; remainder in truſt for John Philips, another ſon of the ſaid *C. P.* for life; remainder in truſt for John's firſt and other ſons in tail male; remainder in truſt for all other the ſons of the ſaid *C. P.* their father for their life, with like remainders to their iſſue male in tail; remainder in truſt for the teſtator's own right heirs for ever.

The teſtator died ſeiſed of ſeveral copyholds, and *A. B.* and *C.* have been admitted thereunto under the truſts in the ſaid will.

By the death of *A.* and *B.* *C.* is become the only ſurviving truſtee; and he being very old, the tenant for life is deſirous of avoiding the expence of admitting the heirs at law upon his death.

Mr. Green's Opinion.

I AM of opinion, that *C.* the ſurviving truſtee may, without breach of truſt, ſurrender the copyholds to mr. Charles Philips, the tenant for life, with remainders over according to the will; and that the lord of the manor cannot refuſe to grant admiſſion on ſuch ſurrender.

November 10, 1759. E. GREEN.

Mr. Booth's Opinion.

IT is clear by the will (which is ſubſtantiated by the ſurrender made by the teſtator in his life-time to the uſe of his will), that the whole legal eſtate was to paſs to *A. B.* and *C.* in fee upon a truſt. This is not like a deviſe, that executors or nominees ſhall ſell the copyhold land to any vendee in fee. There, upon a ſale by the executors or nominees, the vendee ſhall be in by virtue of the firſt deviſe

deviſe and the ſurrender, and ſhall claim the admittance directly, without any intermediate admiſſion granted by the lord to the executors or nominees, and without any ſurrender by or from them. But here is a plain deviſe, a plain gift to *A. B.* and *C.* and they upon admiſſion muſt become tenants to the lord, and are and were bound to perform the ſervices: for the doing thereof they only were diſtrainable, or otherwiſe compellable, according to the cuſtoms of the manor; and the *ceſtui que truſts* were not ſo; and if they are refractory, the lands cannot be ſeiſed into the lord's hands; for he muſt come upon the deviſees, who have the legal eſtate.

The *ceſtui que truſts* have no remedy but in equity; and there are clauſes in the will that even authoriſe the deviſees to receive the rents during the nonage of the *ceſtui que truſts*.

But the eſtate deviſed to the *ceſtui que truſts* being under clear words, concerning the expoſition whereof there is no doubt, *and there being no occaſion for truſtees to preſerve contingent remainders*, the ſurviving truſtee may and ought, by making a ſurrender to the uſe of the perſons who are made *ceſtui que truſts*, or deviſees of the equitable eſtate by the will; and theſe uſes being all of them compatible with copyhold uſes, I apprehend, a ſurrender by *C.* (reciting the will and the truſts, the admiſſion of the deviſees, the death of *A.* and *B.* and that *C.* is the ſurvivor) to the uſe of Charles Philips the ſon for life, remainder to his firſt and other ſons ſucceſſively in tail male, with other remainders as in the will, will be proper, and agreeable to the rules of equity, and will be warranted thereby, and mr. Charles Philips muſt be admitted for his life thereupon.

Auguſt 6, 1765. JA. BOOTH.

Vide Title Copyhold, *Ante*, Vol. I. p. 146.

TENANT AT WILL.

Caſe.

Co. Lit. 55. b. 56. a. and b. 2 Salk. 413, and 414.

A tenant for life, under whom the occu ier of certain lands held at will, died in the cloſe of the year, after the latter had ſown his hard grain, and prepared his barley ſtubbles, but not ſown them — The Opinion of Sir Fletcher Norton, Whether the tenant could, after notice given by the remainderman, ſow his barley and other Lent grain and take the crops?

SARAH AUNGIER being tenant for life of a certain farm houſe, barns, and lands, at Shelford and Stapleford, in Cambridgeſhire, and William Oſtler, of Great Shelford, having occupied the lands (with the farm-houſe and barns) twelve or fourteen years laſt paſt, by parole agreement for three years, or one year, as ſuppoſed at firſt, to hold (after the Old Style), under the ſaid termor for life, at 21l. *per annum*;

Aungier died on the 13th of January 1755 (New Style); and ſaid Oſtler the tenant having ſown rye and wheat crops, and prepared ſome land, by tilling it to ſow on the ſtubble land with barley, the reverſioner, about the 19th or 20th of ſaid January, gave the tenant Oſtler warning, that he may take his grain when ripe off the land ſown, but that he ſhall not ſow any land; for the ſaid reverſioner would enter and occupy it himſelf. But ſaid Oſtler, tenant of the ſaid termor for life, ſays, as he began the quarter before her deceaſe, he will ſow the land tilled ready to be ſown with barley; alſo will plough ſo much land as uſual ſown annually, and now with peaſe and oats; which land has not, ſince the crop taken off, been ſtirred or ploughed: neither is it uſual to till or plough land for ſowing peaſe or oats; for thoſe are ſown on the land, and then ploughed in and harrowed, and nothing elſe done for a crop.

Co. Lit. 55. a. & b. and 56. a.

Note, The reverſioner (now the preſent owner) does not deſire to put Oſtler out of the houſe immediately, but would let him be there till Lady Day next, and longer if he pleaſes, but is not willing he ſhould plough or ſow the land after the death of tenant for life; for ſaid Oſtler will carry away the dung of the laſt year's crop, and carry away the corn ſown before the tenant for life's deceaſe, which will much impoveriſh the land; and if he can ſow the barley, peaſe, and oat crops, now, after tenant for life's deceaſe, and carry away thoſe crops, that will ſtill impoveriſh the land more, and be more prejudice to the reverſioner, than the tilling of the land for a barley crop can poſſibly be to the tenant Oſtler.

Can

Can ſaid Oſtler ſow the land tilled for a barley crop, and ſow the untilled land, as annually done, or either of them, with peaſe and oats, and legally enter when this corn is ripe, and take and carry away ſaid crop (as he may that which was ſown before the ſaid tenant for life Aungier's deceaſe), with paying the uſual rent to the reverſioner from Aungier's deceaſe?

1. Quære. See 5 Co. 85. Knivet's Caſe, the latter part.

I THINK, the termor has a right to take the crop which he had ſown before the death of tenant for life from whom he held the farm; and, upon the principles of a late Caſe determined in the court of common pleas, if a new year was begun before the death of the tenant for life, and no notice had been given to quit, Oſtler is intitled to hold the farm for the reſidue of that year, and conſequently a right to occupy it in any manner he pleaſes, provided he does it in a huſbandlike manner: for in the Caſe of *Denn v. Perkin* the court of common pleas determined, that in caſes where the tenant holds from year to year, and begins upon a new year, without reaſonable notice to quit before the expiration of the old one, that he ſhould not be conſidered as a tenant at will, but as a tenant for that year certain ſo begun upon; and that the landlord had no right to eject him before the end of it, and upon notice.

Anſwer.

If Aungier the tenant for life had occupied ſaid farm herſelf, Could her executors, after her deceaſe, have legally ſown ſuch ſaid ſtubble land as had been tilled for ſowing barley, and taken the grain off when ripe, allowing the remainder man (now the preſent owner) rent from her death? if not, Is the tenant of ſaid Aungier the termor for life in a better condition than her executors; to wit, to ſow ſaid ſtubble land tilled for barley, and ſaid untilled ſtubble land with peaſe and oats, and by law enabled to enter when ripe, and cut and carry the ſame crops away, only allowing the preſent owner rent (from the death of the ſaid termor for life) till Michaelmas next? if not, Can the ſaid remainder man, the preſent owner, enter by ejectment, and recover poſſeſſion of the land, with

2. Quære. 5 Co. 85. Hen. Kinivet's Caſe, latter part.

Vid. 5 Co. 116. Cland's Caſe.

with the crop after termor for life's ſaid deceaſe, or bring an action of treſpaſs for ſuch continuance after termor for life's death? or, What remedy and method muſt the preſent owner of the ſaid eſtate take, or is moſt adviſeable for him to do, as the tenant after demand does keep poſſeſſion, and will ſow the land after the deceaſe of the termor for life, only becauſe he juſt begun a quarter before her deceaſe?

Anſwer. I HAVE entirely anſwered every thing contained in this *Quære*, in my Anſwer to the Firſt Queſtion; and upon the whole circumſtances of this Caſe, I think, it will be moſt adviſeable for the preſent owner of the eſtate to give Oſtler the tenant notice to quit at the end of the year, three months at leaſt before it expires, and wait till that time before he attempts to eject him.

3. Quære. Vide 2 Salk. 413, 414. about leaſing and tenants at will. Was ſaid Oſtler tenant at will, or how otherwiſe, to the termor for life, he hiring as aforeſaid twelve or fourteen years ago, and not ſince; only continued and expected to pay ſaid rent as firſt agreed on, being to keep the manſion-houſe, barns, and out-buildings, in good repair, paying annually the ſaid 21l. (the ſame would have let for 28l. *per annum*, if the leſſor had been to repair)? However, the ſaid Oſtler let one or two of the out-houſes tumble down, and the reſt of the buildings run into decay, and be in a very ruinous condition, who refuſes to repair the ſame. Is there any and what remedy for the preſent owner to take to oblige ſaid Oſtler, or the executors of the termor for life, to repair ſaid ſtanding premiſes, and rebuild the houſes tumbling down?

N. B. It will coſt about 2 col. to make the ſaid dwelling-houſe and out-buildings fit for a tenant.

Anſwer. I THINK, Oſtler, was tenant for a year certain, after the commencement of every new year, and could not be ejected till the end of the year, and after reaſonable notice to quit.

If Oſtler was by contract to repair the buildings, and has not done it, but ſuffered them to go to decay and become ruinous, an action may be brought againſt him for breach of that contract; and if mrs. Aungier the

the tenant for life was puniſhed for waſte, the preſent owner has his remedy againſt her repreſentative: but if the premiſes were ſo much out of repair as ſtated, and that ſome of the buildings were actually fallen down, it would have been adviſeable for the remainder man to have brought his action of waſte, or filed his bill, againſt the tenant for life herſelf, whilſt ſhe was living.

Lincoln's Inn, F. NORTON.
April 9, 1755.

TERMS

TERMS OF YEARS.

CASE 2.

By a marriage settlement, a term of one hundred years is limited to trustees for raising portions and maintenance-money for younger children; with a proviso for cessor of the same term after the said portions and maintenances, and the costs attendant upon the trust, should be raised.—Mr. Wilbraham's Opinion, Whether, as the trusts of this term never took effect, the same term will cease by virtue of such proviso?

BY the settlement on the marriage of Charles lord viscount Fairfax (then the honourable Charles Fairfax, esq.) with the honourable Mary Fairfax, only child of dame Mary Hungate, several manors and lands in the county of York were limited and assured, as to part thereof, to the use of Thomas duke of Norfolk and sir William Fowles baronet, their executors, administrators, and assigns, for the term of ninety-nine years, to commence from the marriage, if lord Fairfax and the said Mary Fairfax should jointly so long live, upon trust to raise and pay the yearly sum of 100l. during the joint lives of the said lord Fairfax and Mary Fairfax, for the separate use of the said Mary; and after payment of the said annual sum of 100l. and the said trustees charges, to permit lord Fairfax, during the continuance of the said term, to take the residue of the rents, issues, and profits, of the premises, over and above the said 100l. *per annum*, as the same should become payable, and the charges aforesaid, to his own use.

And as for and concerning the reversion of the premises comprised in that term, and the residue of the said manors and lands, to the use of lord Fairfax for life, without impeachment of waste, with remainder to trustees during his life to preserve contingent uses; and after his decease (subject to a rent-charge of 500l. to be issuing out of part of the premises for the said Mary Fairfax) to the use of Humphrey Weld, esq. and the said sir Willam Fowles, their executors, administrators, and assigns, for the term of one hundred years, to commence from the death of lord Fairfax, without impeachment of waste; and after the expiration, or other sooner determination, of that term, to the use of the first and every other son of lord Fairfax on the body of the said Mary Fairfax to be begotten successively in tail male; and for want of such issue, to the use of the said duke of Norfolk and sir William Fowles, their executors, administrators, and assigns, for the term of five hundred years from thenceforth

next

next enſuing without impeachment of waſte, with the reverſion in fee to lord Fairfax.

And the ſaid term of one hundred years was limited to the truſtees upon truſt, that in caſe lord Fairfax ſhould, at the time of his death, have an eldeſt ſon living by him begotten on the body of the ſaid Mary Fairfax, and alſo one or more loving children then living, or born after, that then the truſtees ſhould, after the death of lord Fairfax and not before, levy and raiſe, for the portions and maintenance of ſuch younger children the ſums following, *viz.* for the younger ſons of lord Fairfax on the body of the ſaid Mary Fairfax to be begotten, the annual ſum of 100l. a year for each younger ſon during his life, to be paid half-yearly; the firſt payment to be made to each ſon after he and they ſhould attain the age of twenty-one; or in lieu thereof, at the election of lord Fairfax, the ſum of 1000l. a-piece to each younger ſon, to be paid at his and their reſpective ages of twenty-one, if lord Fairfax ſhould be then dead: and upon further truſt, that in caſe there ſhould be ſuch eldeſt ſon, that the truſtees ſhould levy and raiſe for the daughters of lord Fairfax on the body of the ſaid Mary Fairfax to be begotten, the portions and ſums after mentioned, viz. if there ſhould be one ſuch daughter only, then the ſum of 5000l. ſhould be raiſed and paid to ſuch only daughter; and if there ſhould be more than one ſuch daughter, then the ſum of 6000l. ſhould be raiſed and paid to ſuch daughters, equally divided between them, ſhare and ſhare alike; the ſaid reſpective ſums of 5000l. and 6000l. to be payable and paid to the ſaid daughter or daughters at her or their reſpective age or ages of eighteen, or days of marriage, which ſhould next happen after the death of lord Fairfax, with legal intereſt after his death, till the ſaid reſpective portion or portions ſhould become due and payable; and if it ſhould happen that the ſaid daughter or daughters ſhould have attained their reſpective ages of eighteen, or be married, in the life-time of lord Fairfax, then the ſaid portions ſhould be paid within three calendar months after the death of lord Fairfax: and upon further truſt, that the truſtees raiſe ſuch yearly ſums for the maintenance of the ſaid younger ſons and daughters, until their annuities and portions become payable, as the ſaid dame Mary Hungate and lord Fairfax, and the ſurvivor of them ſhould direct or appoint: and upon further truſt, after raiſing the ſaid annual ſums, portions, and maintenances, and ſuch charges and expences as the

truſtees

truſtees ſhould be put to by reaſon of the truſts thereby in them repoſed, then the ſaid ſum of 100l. a-year to ceaſe.

And it was declared that the ſaid term of five hundred years was limited to the duke of Norfolk and ſir William Fowles, their executors, adminiſtrators, and aſſigns, upon truſt, in caſe there ſhould be a failure of iſſue male of lord Fairfax on the body of the ſaid Mary Fairfax lawfully to be begotten, or being ſuch iſſue male all of them ſhould happen to die without iſſue male before any of them attained the age of twenty-one, and that lord Fairfax ſhould have one or more daughter or daughters by him on the ſaid Mary Fairfax to be begotten, either born in his life-time or after his death, that then the ſaid truſtees ſhould, after the death of lord Fairfax without iſſue male as aforeſaid, and not before, raiſe, levy, and pay, ſuch ſum and ſums of money for the portion or portions for ſuch daughter and daughters, and her and their yearly maintenance, till ſuch portion or portions ſhould be due and payable as afore-mentioned, *viz.* in caſe there ſhould be but one ſuch daughter, and no more, then ſuch only daughter ſhould have 6000l. for her portion; and in caſe there ſhould be two or more ſuch daughters, then ſuch two or more daughters ſhould have 8000l. for their portions, equally to be divided between them, ſhare and ſharealike, and to be payable and paid to the ſaid daughter and daughters at her and their ſeveral and reſpective age or ages of eighteen years, or day or days of marriage, which ſhould firſt happen after the commencement of the ſaid term: and in caſe there ſhould be one ſuch daughter, and no more, then ſuch only daughter ſhould have the yearly ſum of 40l. for her yearly maintenance till ſhe attained the age of twelve; and from and after the age of twelve, then ſuch only daughter ſhould have the yearly ſum of 120l. till her portion became due and payable, and be raiſed and paid: and in caſe there ſhould be two or more ſuch daughters, then each and every ſuch daughters ſhould have the yearly ſum of 30l. a-piece for their maintenance till their reſpective ages of twelve; and from thence, each daughter ſhould have the yearly ſum of 60l. till their reſpective portions ſhould become due and payable and be raiſed and paid; the ſaid ſeveral annual ſums for maintenance to be payable and be paid at Michaelmas and Lady Day by equal portions; the firſt payment to begin and be made at ſuch of the ſaid Feaſts as ſhould next happen

happen after the commencement of the ſaid term of five hundred years. And if it ſhould happen that ſuch daughter or daughters, or any of them, ſhould have attained her or their age or ages of eighteen, or be married before the commencement of the ſaid term, then the portion or portions of ſuch daughter or daughters which ſhould have attained her or their age or ages of eighteen, or be married before the commencement of the ſame term, ſhould be paid unto her or them reſpectively within ſix calendar months next after the commencement of the ſame term. And if it ſhould happen that there ſhould be more than one ſuch daughter, and that one or more of them ſhould happen to die before ſhe or they ſhould have attained the age of eighteen or be married, then the ſaid portion or portions of her or them ſo dying ſhould not go to her or their executors or adminiſtrators, but ſhould go and be payable to the ſurvivors of ſuch daughters which ſhould attain ſuch age or be married.

And it was alſo provided, that after the ſaid portions, ſum and ſums of money for maintenance, ſhould be levied raiſed, and paid, together with the ſaid truſtees charges and expences occaſioned by the truſt thereby in them repoſed; or if any perſon or perſons who ſhould have any eſtate in reverſion of and in the ſame premiſes, expectant upon the determination of the ſaid term of five hundred years, ſhould pay or ſufficiently ſecure the ſaid portions, ſum and ſums of money for maintenance; or if there ſhould be no ſuch daughter or daughters as aforeſaid; or in caſe all ſuch daughters ſhould die before any of them attained her or their age of eighteen or be married; that then, in each and every of theſe caſes, the ſaid eſtate and term of five hundred years ſhould ceaſe, determine, and be utterly void.

Lord Fairfax had iſſue by the ſaid Mary his wife ſeveral ſons (who died in their infancy unmarried); and two daughters, *viz.* Anne and Elizabeth; and lady Fairfax died ſeveral years ſince.

Lord Fairfax, in the year 1750, ſold part of the eſtate compriſed in the above ſettlement; and the ſaid Anne Fairfax having attained her age of twenty-one, the ſum of 4000l. part of the purchaſe money, was then paid to the ſaid Ann Fairfax, as and for her ſhare and proportion of the 8000l. which ſhe was entitled to by virtue of the truſts of the aforeſaid term of five hundred years. But her ſiſter Elizabeth being at that time under the age of eighteen,

eighteen, the ſum of 4000l. (other part of the purchaſe-money) was agreed to be inveſted in the purchaſe of Old South Sea Annuities, in the names of ſir William Fowles, bart. (the ſon and executor of the aforeſaid ſir William Fowles, who had ſurvived the ſaid duke of Norfolk, and was then dead), and of Alexander Hamilton, gentleman, upon truſt to permit the intereſt and dividends thereof to be received by lord Fairfax during his life; and immediately after his deceaſe, then to ſtand poſſeſſed of and intereſted in the ſaid 4000l. and the intereſt and dividends thereof upon the truſts following, *viz.* in caſe the ſaid Elizabeth ſhould live to attain the age of eighteen or be married, then in truſt for her executors, adminiſtrators, and aſſigns; but in caſe he ſhould die under the age of twenty-one, and without having been married, then in truſt for ſuch perſon and perſons as, by virtue of and under the truſts of the ſaid term of five hundred years, ſhould be then entitled to the ſame. And the ſaid ſir William Fowles the ſon did, on the 14th of April 1750, at the requeſt, and by and with the conſent and direction of lord Fairfax and the ſaid Anne Fairfax, bargain, ſell and aſſign to the ſaid Alexander Hamilton, the lands which had been agreed to be purchaſed of lord Fairfax, to hold to the ſaid Hamilton, his executors, adminiſtrators, and aſſigns, for the reſidue then to come and unexpired of the ſaid term of five hundred years, in truſt for the purchaſers, their heirs and aſſigns, and to attend the inheritance of the ſaid premiſes.

And the ſaid laſt-mentioned 4000l. was inveſted in the purchaſe of 3821l. 5s. Old South Sea Annuity Stock, in the names of the ſaid ſir William Fowles and Alexander Hamilton.

The ſaid Elizabeth Fairfax died the 25th of June 1753, before ſhe attained her age of eighteen; and lord Fairfax being minded and deſirous that the ſaid Annuity Stock ſhould be transferred and made over to the ſaid Anne Fairfax in ſatisfaction of the remaining part of the ſaid ſum of 8000l. which ſhe was become entitled to by virtue of the truſts of the ſaid term of five hundred years, the ſaid ſir William Fowles and Alexander Hamilton did therefore, on the 4th of September 1753, by lord Fairfax's direction, transfer the ſaid 3821l. 5s. Annuity Stock to the ſaid Anne Fairfax; and the ſaid Anne Fairfax did, by an indenture dated the ſaid 4th day of September 1753, acknowledge and declare, that ſhe accepted the ſame in

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full recompence and ſatisfaction of and for her remaining ſhare and proportion of the ſum of 8000l. which was provided for the daughters of the ſaid lord Fairfax begotten on the body of the ſaid Mary lady Fairfax by virtue of the ſaid term of five hundred years, and which the ſaid Anne Fairfax was become entitled to by and upon the deceaſe of the ſaid Elizabeth Fairfax, ſhe having only attained the age of eighteen years. And the ſaid Anne Fairfax did, by that indenture, releaſe, exonerate, and diſcharge, all and ſingular the manors, lands, tenements, and hereditaments, compriſed in the ſaid term of five hundred years, of and from the ſaid principal ſum of 8000l. provided for the daughters of the ſaid lord Fairfax begotten on the body of the ſaid Mary lady Fairfax by the truſts of the ſaid term of five hundred years, and every part thereof; and of and from all and every or any other ſum or ſums of money which ſhe the ſaid Anne Fairfax was or might or could, at any time or times thereafter, be entitled to, by virtue or in reſpect of the ſaid laſt-mentioned term, or the truſts thereof.

The term of ninety-nine years, created by the ſettlement of the 9th May 1722, is conceived to have determined on lady Fairfax's death; and as to the two other terms of one hundred years and five hundred years, as there is a failure of iſſue male of the marriage, and that the ſaid Anne Fairfax has in the life-time of her father been paid and ſatisfied the ſum of 8000l. provided for the daughters of the ſaid lord Fairfax begotten on the body of the ſaid Mary lady Fairfax by virtue of the truſts of the ſaid term of five hundred years; and has by the ſaid deed of the 4th September 1753, releaſed and diſcharged the manors and lands compriſed in that term of and from the ſaid principal ſum of 8000l. provided for the daughters of the ſaid lord Fairfax begotten on the body of the ſaid lady Fairfax by the truſts of that term; and of and from all other ſum or ſums which ſhe was or might or could, at any time or times thereafter, be entitled to, by virtue or in reſpect of the ſame term or the truſts thereof:

Whether either of the ſaid terms of one hundred years and five hundred years are now ſubſiſting, or can any way ariſe? and in caſe lord Fairfax was now to ſell any part of the eſtate compriſed in thoſe terms, Whether he could reaſonably require, or, Would it be of any avail to him to have an aſſignment of the ſaid terms, or either of them, from the preſent ſir William Fowles (in whom both Quære.

both terms are now veſted, by his father having ſurvived mr. Weld and the duke of Norfolk) in order to protect his purchaſe? and in caſe ſir William Fowles ſhould, for the ſatisfaction of a purchaſer, execute an aſſignment of both ore ither of thoſe terms, Would the ſaid ſir William be ſafe in ſo doing?

Anſwer. THOUGH an eſtate of freehold cannot be made to ceaſe by the direction of the parties in a conveyance, but muſt be taken from the party in whom it is veſted by the ſame or the like means as it came to him, yet it is otherwiſe in the caſe of a term of years; for that may be made to ceaſe abſolutely by the conveyance itſelf, upon the performance of any previous act; and therefore the practice in conveyancing has for many years laſt paſt (in order to prevent the difficulties which often attend the procurement of terms of years to be aſſigned) declared truſt terms to ceaſe upon the performance of the truſts. This is done with regard to the term of five hundred years. And if the truſts of this term are fully executed, then I think, that it is not now ſubſiſting, nor can any ways ariſe, in regard it does not exiſt, but is abſolutely extinguiſhed and gone as if it had never exiſted: and therefore, if lord Fairfax was now to ſell any part of the eſtate compriſed in this term, a purchaſer could not reaſonably, I think, require, nor would it be of any avail to him to have an aſſignment of it; for as to the term of five hundred years, I think, the truſts of it are fully performed; and this appears from the inſtruments above mentioned: ſo that this term, by the direction of the conveyance, is clearly ceaſed and extinct. But as to the term of one hundred years I have ſome doubt. The one hundred years term was created for the raiſing portions and maintenances for younger children of the marriage, in caſe there was an eldeſt ſon living at the time of the death of lord Fairfax. The lady is dead, and there is no ſon; ſo that the event

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on which this truſt is to become effectual cannot happen; for there cannot be an eldeſt ſon and younger child or children. However, the deed does not direct the ceaſing of the term by a *proviſo*, as in the caſe of the other term; but declares that it was upon this further truſt, that after raiſing the portions and maintenances, and the truſtees charges, then the ſaid term of one hundred years to ceaſe; which is impoſſible upon the events that have happened. I am therefore afraid, that this term, which I think did exiſt, has not ceaſed; and therefore, upon a purchaſe of theſe lands, I think that the purchaſer may well expect an aſſignment of the remainder of this term of years to a truſtee to attend the inheritance. And I think that as the truſts of it are capable of being performed, the truſtee may ſafely aſſign the term as lord Fair fax ſhall direct.

Lincoln's Inn, R. WILBRAHAM.
October 30, 1755.

TITHES.

TITHES.

Caſe 1.

The pariſhioners of *A.* having, for a great length of time, paid a fixed pound-rate as a *modus*, in lieu of tithes in kind; Serjeant Cheſhire's Opinion, Whether a terrier of 1637 was ſufficient evidence of the latter mode of payment, ſo as to overturn the long acquieſcence under the compoſition?

THE pariſhioners of *A.* preſcribe in the *modus decimandi* following, to pay to the parſon two ſhillings in the pound rent only, without deduction for any taxes or other outgoings chargeable upon the lands, or upon the perſon in reſpect of his lands (but ſome of the farmers, by contract with their landlords, bear only part of the ſaid two ſhillings *per* pound, and the landlord the reſidue), in full of all manner of tithes whatſoever happening, growing, or ariſing yearly upon their reſpective lands within the ſaid pariſh.

By a terrier found and returned into the Conſiſtory Court of Lincoln (as it is conceived upon a Viſitation) in 1637, it was found that then the rector had full tithes in kind of every thing within the ſaid pariſh; and that the ſaid pariſh did then (and ſo it does now) conſiſt of incloſure and a great deal of heath ground, on which not only grow conſiderable and large crops of corn yearly, but alſo are bred great numbers of lambs, and large flocks of ſheep kept.

1. Quære.

If the exceſs of the *modus* be not an evidence againſt it? but if it be not, Whether the terrier found in 1637 will not be an evidence to deſtroy the *modus?*

2. Quære.

Admit it will not, if the parſon can prove that by agreement between the landlord and tenant to defraud the parſon, a leſs rent is reſerved than is really paid, or other covin made uſe of to the ſame purpoſe, Shall not the parſon have relief in a court of equity or court ſpiritual, or both or either? or, What remedy is there? and, May not the pariſhioners not parties to the ſuit lawfully maintain a ſuit brought againſt any one of them? and, Which will be the beſt method to ſue for the tithes in kind; whether in court ſpiritual or a court of equity?

Anſwer to Firſt Quære.

I think, the terrier in 1637 is a ſtrong evidence that tithe in kind is due in this place: beſides, this payment is in itſelf to be conſidered only as a temporary agreement

or

or compoſition, and is void as a *modus* to diſcharge tithes in kind.

I THINK, it is moſt adviſeable for the parſon to exhibit his bill in the exchequer, to have an account of tithes in kind, and therein to take notice of the pretence of a *modus* ſet up of late years, and, under colour thereof, of the fraudulent underhand agreement. If the *modus* be ſet up throughout the pariſh, no pariſhioner can be a witneſs; but if the parſon ſue one or more of them, the others may lawfully aſſiſt and maintain him or them ſo ſued, becauſe they may be affected by the event of the ſuit againſt the other pariſhioners. Anſwer to Second Quære.

October 17, 1718. JO. CHESHYRE.

CASE 2.

Mr. WILBRAHAM's OPINION upon the mode of payment of agiſtment tithe, and what uſage ſhould conſtitute a *modus*.

A. B. rents an upland farm, one-third part whereof is in tillage, the corn tithe whereof is taken by the impropriators, and upon the other part of the farm he keeps milch cows, part whereof he ſuckles, and part he makes uſe of for butter and cheeſe.

HE likewiſe rents two marſhes at a rack-rent, of which he ploughs no part, but keeps a part for a growing ſtock, and other part for a fatting ſtock.

N. B. IT was never known that the vicarial tithe was taken in kind in this pariſh, but has always been by way of compoſition; and the marſh land, where no part is ploughed, has generally been compounded at the rate of two ſhillings in the pound: but the marſh lands being liable to be overflowed by the ſalt water, the rent has been often varied, and the tithe varied in proportion. Part of the ſtock is kept three years upon the marſhes before they are fatted, which renders it impoſſible to account annually for the produce. As to the upland farms, where one-third is ploughed, it has been a general cuſtom to pay the vicar, by way of compoſition, eighteen pence in the pound, and none known to exceed that rate. However, the vicar refuſes to accept thereof, or to take his tithe milk, &c. in

kind, but inſiſts that *A. B.* ſhall account for and pay the tenth penny for the real produce of the farm; which is ſuppoſed never to be done any where.

NOTE, No vicarial tithe was ever known to be taken in kind in this pariſh, through pretence of any certain *modus* in lieu thereof.

1. Quære. WHETHER can the vicar refuſe to take the tithe milk, calf, and lamb, in kind, as they become due? or, Whether muſt he come to the field to take tithe milk? or, Muſt *A. B.* be obliged to drive the cows to any particular place to milk, in order for the vicar to take tithe milk in kind?

Anſwer. THE vicar can demand nothing legally but his tithe milk, calf, and lamb, in kind, as they become due, and cannot inſiſt upon the tenth of the net produce of the farm.

I THINK, that the tithe of milk is payable at the place where it is milked, unleſs there is a cuſtom, time out of mind, to bring it to the church, or to the parſonage-houſe; and when the pariſhioner has milked his cows, he muſt ſet out the parſon's tenth part in ſome pan or veſſel for the parſon, and is under no obligation to take any further care of it.

2. Quære. CAN the vicar oblige *A. B.* to render an account what he makes of calves, butter, cheeſe, and lambs, and to pay him a tenth penny of the money he ſells them for?

Anſwer. I THINK clearly that he cannot; for a conſiderable part of the value of butter and cheeſe is by the manufacturing of the milk: and I think, that the parſon is not entitled to the tenth part of the value of the pariſhioner's labour.

3. Quære. CAN the vicar refuſe to accept two ſhillings in the pound for tithe of herbage? or, By what other method can he oblige *A. B.* to pay tithe of the marſh lands?

Anſwer. I THINK, that as the tithe of herbage cannot be paid ſpecifically, the pariſhioner ought to pay two ſhillings, in

in the pound of the yearly value of the lands which are agiſted with barren and unprofitable cattle, and no more.

Lincoln's Inn, R. WILBRAHAM.
November 2, 1739.

Case 3.
Mr. Wilbraham's further Opinion upon the like Queſtion.

MR. *W* is vicar of Canewdon in the county of Eſſex, in which pariſh there are great quantity of marſh as well as upland, upon which barren and alſo profitable cattle have been paſtured promiſcuouſly, ſome part of the year upon the marſh, and in other part of the year upon the upland; and the vicar has uſually compounded with the occupiers for ſome time paſt for the tithe of ſuch barren, and the titheable matters ariſing from ſuch profitable cattle, at the rate of one ſhilling and ſixpence yearly for every acre of ſuch upland, and two ſhillings an acre for the marſh land, according to the rents paid for ſuch lands reſpectively; and amongſt theſe is one mr. *Sly*, with whom *W.* has thus compounded: but this payment not being near the value of his tithes, and there being no pretence that this payment can be eſtabliſhed as a *modus*, being only a modern compoſition made with the vicars from time to time, and not always paid at the rate aforeſaid, according to the rent of the lands, particularly the marſh lands, *W.* therefore deſires to know,

1. Quære.

WHAT tithes are to be paid for ſuch cattle ſo agiſted as aforeſaid, part whereof conſiſt of ſheep, from whence the occupier has wool, and lamb, and alſo of milch cows and other profitable cattle, as well as unprofitable cattle? and, In what manner is the tithe agiſtment of the barren cattle payable, whether according to the value of the agiſtment, or the rent of the land? or, How otherwiſe?

Anſwer.

AS this land has been agiſted by a mixed ſtock, part of which is liable to the payment of tithe herbage, and the other part exempted, the paſtor cannot claim his tithe by the value or rent of the land: but the courſe of the court of exchequer has been, in thoſe caſes, for the officer of the court to take an account of the value of the agiſtment

of the unprofitable cattle, and to allow the parſon the tenth part of ſuch ſum. As to the profitable cattle, as cows which yield milk, and calves, or ſheep which yield ithe wool, and perhaps lambs, and as to all cattle reared for the pail and plough—all theſe, I think, are abſolutely exempted from the payment of tithe herbage.

1. Quære. SUPPOSING the payment of two ſhillings in the pound could be eſtabliſhed as a *modus* in reſpect of the marſh land, Is not the tithe of milch cows, during the time they are fed on the other land, payable? and, Is not the tithe of wool ſheered, and lamb and calves yeaned and calved upon the uplands, payable, though the ſheep and cows producing the ſame are fed part of the year upon the marſh lands, according to the occupier's courſe of huſbandry? and in caſe ſuch calves, lamb, and wool, fall or are ſhorn upon the marſh lands, and the cows and ſheep producing the ſame are agiſted part of the year upon the uplands, Is any tithe in ſuch caſe payable for the ſame?

Anſwer. A PAYMENT of this kind, I think, cannot be ſupported as a *modus*; for if the land was fed by unprofitable cattle only, it is the rector's due of common right, that is, by the general law of the kingdom: for this, that is two ſhillings in the pound, according to the rent of the land, is the meaſure by which tithe in ſuch caſe is payable. And I think, that the ſum is too large to be ſupported to be a *modus*, and muſt be taken only to be a compoſition; and ſuch compoſition, I ſuppoſe, has always extended to all ſpecies of tithes that ariſe from the cattle fed on theſe marſh lands, as well as to the tithe herbage: but if cattle ſometimes fed on this marſh land, and ſometimes upon the upland, produce any titheable matter, as calves, milk, lamb, wool, &c. during ſuch time as they are fed upon the uplands, then I think that ſuch tithes will be payable, and not compriſed in the compoſition for marſh lands.

Lincoln's Inn,
Auguſt 8, 1745. R. WILBRAHAM.

THE

CASE 4.

THE uſual day of payment of tithe wool and lamb is the 17th day of July, and the ſheep-maſter uſually keeps lambs one, two, four, or ſix months afterwards before he ſells them, by which means the rector uſually loſes the benefit of the herbage of the ſaid lambs during the ſaid time.

The uſual day of payment of the tithe wool and lambs being the 17th of July, and the owner uſually keeping his lambs ſome months afterwards before he ſells them—The ſeveral Opinions of Mr. Perrott and Mr. Wilbraham, in what manner tithe is payable for the herbage of theſe lambs during ſuch interval.

WHETHER the rector is entitled to his tithe of the profits, or increaſe in the value of thoſe lambs, or the herbage of the land during the ſaid term? Quære.

I THINK, from the time the lambs become titheable, tithe herbage is payable for them till ſold. Opinion of Mr. Perrott.

October 23, 1755. GEO. PERROTT.

AS theſe lambs are ſold in this caſe before they are clipped, they would yield no ſort of tithe unleſs they paid an agiſtment tithe; and therefore I think, that an agiſtment tithe is in this caſe due to the parſon, for they are as to him barren and unprofitable cattle. Opinion of Mr. Wilbraham.

Lincoln's-Inn R. WILBRAHAM.

October 27, 1755.

In the Common Pleas.

JONES, *Clerk, againſt* JOHN BEDELL.

DEFENDANT'S CASE.

CASE 5.

THE plaintiff is, and has been for ſome years laſt paſt, rector of Paulerſpury in the county of Northampton, and, as ſuch, entitled to tithes of corn, grain, hay, wool, A grant is made by Charles I. of certain parks, which are afterwards diſparked.—Serjeant Poole's Opinion, Whether theſe lands are exempt from the payment of tithe; and whether, if titheable, they are liable to the payment of the full tenth in kind, as newly cultivated lands?

wool, and calf, in their proper kind, *viz.* for calves calved in the pariſh, every tenth calf; or if but ſeven, to the ſeventh calf; and for tithe lamb, eighteen pence for every lamb; and by cuſtom time immemorial, to two-pence halfpenny a cow yearly and every year, for every cow depaſtured within the ſaid pariſh of Paulerſpury, inſtead and in lieu of tithe milk.

THAT from Ladyday 1751 to Ladyday 1752 defendant rented and occupied two ſeveral cloſes of paſture in Paulerſpury aforeſaid, called Foxhole's and Hobcraft's Cloſes, upon which defendant depaſtured eight cows that year; and on defendant's wife's ſettling account with plaintiff, paid him twenty-pence for the tithes thereof, being two-pence half penny *per* cow; and plaintiff gave defendant's wife a receipt in full for the tithes for that year. (The receipt appears to be for one ſhilling and nine-pence only. *Vide* copy of plaintiff's receipt for ſame.)

THAT from Ladyday 1752 to Ladyday 1753, defendant rented and occupied the ſeveral cloſes of paſture in Paulerſpury called by the ſeveral names of Hobcraft's, Ratley's, Cook's Hollowcraft's, Roſe Cloſe, Wills's and Foxholes' Cloſes; all which (except the two laſt Cloſes) he hained and mowed, and paid the plaintiff two pound in full for the tithe hay thereof (as agreed) for that year; and plaintiff gave him receipt accordingly. (*Vide* copy of receipt). And defendant kept and depaſtured nine cows on the ſaid premiſes from Ladyday 1752 to Ladyday 1753, for which plaintiff is entitled, according to ſaid ancient cuſtom, to one ſhilling and ten-pence halfpenny, being two-pence halfpenny *per* cow, for and in lieu of tithe milk of ſaid cows; which defendant tendered and offered to pay plaintiff at the time he paid him ſaid two pound for the hay tithe: but plaintiff refuſed to take it. (No one preſent at time of this tender but plaintiff and defendant.)

THAT from Ladyday 1753 to Ladyday 1754, defendant continued to hold and occupy the ſaid ſeveral Cloſes which he held in the year preceding; mowed the Cloſes called Foxholes', Hollowcraft's, Cook's, and Roſe Cloſes; grazed Wills's Cloſe, Hobcraft's and Ratley's, upon which he depaſtured nine cows only this year; for which plaintiff is entitled to one ſhilling and ten-pence halfpenny, being two-pence halfpenny a cow in lieu of tithe milk of ſaid cows. And defendant agreed with plaintiff for all the tithe of his hay cut this year for the ſum of twenty-two or twenty-three ſhillings; which defendant ſome time after

after the end of the year tendered to plaintiff, by laying ſame down on a table in his houſe in his preſence, together with ſaid ſum of one and ten-pence halfpenny for ſaid nine cows kept that year: upon which plaintiff (who is very choleric) fell into a violent paſſion, and, after many wrathful expreſſions, abſolutely refuſed to take it.

DEFENDANT ſtill continues to rent the ſaid ſeveral Cloſes, and has paid the plaintiff for his tithe of hay this year, as by agreement, thirty-three or thirty-four ſhillings; keeps ten cows this year, ſeventeen ſheep, and had one lamb.

NOTE, THE two Cloſes in the declaration called Cook's and Hollowcraft's, are the eſtate of the duke of Grafton, and rented of his Grace by defendant; and four of the other Cloſes, *viz.* Foxhole's, Wills's, Ratley's, and Hobcraft's, are the eſtate of Thomas Prowſe, eſq. and rented of him by defendant.

NOTE, THIS ancient cuſtom of paying two-pence halfpenny a cow in lieu of tithe milk is what plaintiff is endeavouring to break through, and to make all occupiers of land within ſaid pariſh of Paulerſpury pay tithe milk in kind, by every tenth meal; and to that end refuſes to accept two-pence halfpenny a cow of defendant for the years 1752 and 1753, and alſo for the tithe of hay in 1753, as abovementioned.

AND has brought like actions againſt others as well as defendant.

NOTE, IN declaration plaintiff declares for one pound four ſhillings due for tithe hay, as I underſtand it, for the year 1753; and, according to defendant's account, one pound four ſhillings, or one pound three ſhillings, is what is due to plaintiff for the tithe of hay in 1753.

THAT on the 11th day of April laſt, plaintiff ſent to defendant's houſe, deſiring him to come and pay his tithes, and that he would have them that day; but defendant not being at home, his wife acquainted the meſſenger, that the next morning her huſband ſhould come and pay plaintiff his tithes: but the meſſenger returned with word, that plaintiff inſiſted on immediate payment, and that unleſs ſhe came and paid him, he would ſend for writ immediately: whereupon ſhe went directly to plaintiff, and told him ſhe was come to pay him his due, and accordingly pulled out three pound fourteen ſhillings, or three pound ſeventeen ſhillings, and tendered him the ſame upon the table then before him, to pay him the two or three

three and twenty ſhillings for tithe hay for the year 1753, and two-pence halfpenny *per* cow for the years 1752 and 1753; but he appeared in a violent paſſion with her, and utterly refuſed to take ſame.

NOTE, NOBODY preſent but plaintiff and defendant's wife.

That Daniel of Paulerſpury aforeſaid, being alſo indebted to the plaintiff for tithes, and he and defendant being both unable of themſelves to prevail with plaintiff to ſettle accounts and receive their monies, ſaid Daniel paid about twenty pounds into the hands of mr. Michael Rooker of Paulerſpury aforeſaid, and defendant alſo paid him about , in order for him to pay plaintiff, and ſettle accounts with him; to which end, about a day or two afterwards, and long before the action brought, plaintiff coming in his chair through mr. Rooker's gate, mr. Rooker told him, that ſaid Daniel and defendant Bedell hath both left money with him to pay him for his tithes, and if he pleaſed he would tell the money over, and pay him as he ſat in his chair, and he might ſign receipts for the ſame; to which plaintiff anſwered,—"No, damn 'em, I'll ſue 'em to the devil." —And ſome few days after this, mr. Rooker met plaintiff coming up Cuttle-mill hill, and, after ſome diſcourſe had between them, he told plaintiff he (Rooker) had got Daniel's and Bedell's money in his pocket, and that he deſigned to call at his (plaintiff's) houſe, to know if he would take it. When plaintiff aſked him, What money he propoſed paying him for defendant Bedell? Rooker replied, "I'll pay you all your demands, whatever they are, for tithes due from him; only for mr. Prowſe's grounds (meaning the grounds of him rented by defendant, and called Foxholes', Wills's, Ratley's, and Hobcraft's) no more than two-pence halfpenny *per* cow, according to ancient cuſtom:" to which the plaintiff replied, "Then, I won't take it."

Copy of the two Receipts above-mentioned given by Plaintiff to the Defendant.

1. "Then received of John Beedles by the hands of his wife, one ſhilling and ninepence, in full for tithes to Ladyday laſt paſt, by me

"*July the 2d*, 1752. N. JONES."

"*N. B.* The horſe-hire is paid for."

2. "Then

2. "Then received of John Beedles two pounds, in full "for the hay tithe of Hobcraft's, Ratleigh's, Cook's, "Hollowcraft's, and Roſe Cloſe, ending the hay-"harveſt for the year 1752 (Wills's Cloſes and "Foxholes' not accounted for yet)

"N. JONES."

Whether to pay the one pound four ſhillings, and one ſhilling and tenpence halfpenny for the nine cows, in each of the years 1752 and 1753, into court? or, To demur? or, How otherwiſe plead to plaintiff's declaration? which it is preſumed is very defective. Quære.

Note, In a letter to me from a ſubſtantial farmer in Paulerſpury, he ſays the cuſtom of paying tithe in that pariſh is, for all-ground as they eat, two-pence halfpenny a cow, eighteen pence a lamb, tithe graſs when mowed, and every tenth fleece of wool.

Note, Defendant depaſtured only nine cows—no other ſtock in the years 1752 and 1753, and had not ſeven calves in either year.

I DO not ſee any cauſe of demurrer to the declaration; and as the defendant admits there is money due to plaintiff on account of tithe hay, and likewiſe for agiſtment, and as he cannot prove a legal tender of the money due, I think it will be moſt adviſeable for defendant to pay the one pound four ſhillings, and what is due for agiſtment according to the cuſtom, and ſo likewiſe the value of the other tithes retained by him, into court: but, by the ſtate of this Caſe, there does not appear to be more due to plaintiff than the above ſum for tithe hay, and one ſhilling and tenpence for the agiſtment. Anſwer.

January the 22d, 1755. D. POOLE.

IN

Further Caſe. IN the introductory part of this declaration plaintiff ſets forth, that he is proprietor of the tithes of Cook's Cloſe, Hollowcraft's, and Foxholes', but is ſilent as to Wills's Cloſe, Hobcraft's, and Ratley's.

PLAINTIFF in none of the counts ſets forth, whether he is as proprietor, or farmer, or rector, or otherwiſe entitled to tithes; but only, that defendant was indebted to plaintiff for certain tithes.

OF the ſeveral Cloſes in the declaration mentioned, Foxholes', Wills's, Ratley's, and Hobcraft's, are all that are the freehold of mr. Prowſe, who defends this ſuit for his tenant, foraſmuch as theſe four ſeveral Cloſes never paid for tithes of any kind until within eight or ten years paſt; and ſuch tithes as have been paid for milk have been under the general *modus* or compoſition in lieu of the tithes thereof within the ſaid pariſh.

THESE four ſeveral Cloſes, which are in Paulerſpury pariſh, were part of the parks called Grafton Park and Potterſpury Park, and have been diſparked more than one hundred years ago. They were granted from the crown tithe free by king Charles I. in the 19th year of his reign. The words of his letters patent are as follow:

"*Tot. ill. parcum vel parcos noſtros vocat. ſeu vulgarit.*
"*cognit. per nomen de Grafton Parke et Potterſpury Parke,*
"*ac omnes terras quaſcunque vocat. ſeu communiter cognit.*
"*per nomen vel nomina de Grafton Parke et Potterſpury*
"*Parke, in dicto com. noſtro Northampton. prout modo in-*
"*cluduntur ſive includitur.*

"*Et ulterius dedimus et conceſſimus omn. et omnimod.*
"*decimas cujuſcunque mod. generis ſive ſpeciei de ex vell.*
"*infra parc. ſive parc. prædict. de tempore in tempus*
"*creſcen. renovan. ſive pertinen. quæ ad nos aliquo modo*
"*pertinent aut pertinere debent.*

"*Et ulterius dedimus et conceſſimus plenam et abſolutam*
"*proteſtatem et authoritatem ad bene placitum et voluntatem*
"*ipſorum Georgii Strode et Arthuri Duck hæred. et*
"*aſſign. ſuor. diſparcand. parc. vel parc. prædict, et*
"*cæter. premiſs. vel aliquam inde parcell. tam de viridi et*
"*venatione quam de omnibus aliis quibuſcunque ad parc.*
"*pertinen. necnon de tempore in tempus in omnibus*
"*convenientibus temporibus anni ſuccidend. proſternand.*
"*et eradicand. omnes et omnimod. boſcos, &c. Et quod*
"*bene*

" *bene liceat et licebit præfat. Strode et Duck, hæred. et* " *aſſign. ſuis in paſtur. ſive in cultur. convertere et redigere* " *omnes et quaſcunque copiceas boſcos ſive ſubboſcos infra* " *aut ſuper prædict. parc. ſive parc. terr. et cætera præmiſſa* " *per præſentes ſuperius mentionat. fore conceſſ. et quamlibet* " *ſeu aliquam inde partem vel parcell. creſcen. ſive exiſten.* " *abſque aliqua conſervatione ſeu ſenſur. gernim. inde* " *necnon prædict. parc. et parc. et omnia et ſingula præ-* " *miſſa aut aliquam inde partem vel parcellam cum perti-* " *nen. in cultur. vel paſtur. convertere ac redigere, ac eadem* " *incluſ. et in ſeparalitat. redact. retinere.*"

THESE parks, by ſeveral meſne aſſignments, are now become legally veſted in mr. Prowſe, and ſtill retain the general name of The Parks, though not known by the oldeſt man living when the ſame were diſparked. The ſeveral meſne aſſignments diſtinguiſh the premiſes in theſe words: " All that or thoſe park or parks called or known " by the name of Grafton park and Potterſpury Park, " and all lands whatſoever called or known by the name " of Grafton Park and Potterſpury Park, and all and " ſingular the meſſuages, houſes, edifices, buildings, " barns, ſtables, dove-houſes, gardens, orchards, lands, " tenements, meadows, paſtures, woods, underwoods, " common of paſture, profits, commodities, franchiſes, " liberties, privileges, immunities, and advantages what- " ſoever, to the ſaid park or parks and other the premiſes " belonging, or in anywiſe appertaining, or accepted, " reputed, or taken, as part, parcel, or member thereof; " and all and all manner of tithes from time to time " hereafter growing, renewing, or coming out of, or upon, " or within, the ſaid parks and premiſes, or within " Grafton aforeſaid; and all and ſingular other the meſ- " ſuages, lands, and hereditaments, late of the grantor, " ſituate, lying, and being, in Grafton, Potterſpury, " Paulerſpury, Aldrington, and Yardley, or in any " other town or place near adjoining in the county of " Northampton."

WHETHER mr. Prowſe can ſupport the exemption of the premiſes, though diſparked, under the circumſtances of this Caſe? 1. Quære.

AFTER the park was diſparked, and came into the hands of the feoffees of the crown, I think, the lands became titheable. Anſwer.

2. Quære. If the four Cloſes be titheable, whether they come under the general cuſtom or *modus* of other lands within the ſame pariſh? or, Muſt they pay the full tenth, or in kind, as new cultivated lands not comprehended within the cuſtom?

Anſwer. SUCH cuſtom or *modus* as is general throughout the pariſh, I think, will include the four Cloſes; and that the occupiers will not be liable to payment of the tithes in kind.

3. Quære. Whether the relief ſought is proper in a court of law, or relieveable only in a court of equity, the plaintiff's deſign being to deſtroy all *modus's* or compoſitions?

Anſwer. I DO not well underſtand this queſtion, as I do not know the defendant has any occaſion to ſeek any other relief than what a proper defence will afford him. If he is ſued in the ſpiritual court for tithes in kind, he may plead the *modus*; and if that be denied in the ſpiritual court, the temporal courts will grant a prohibition, and have the *modus* tried at common law.

February 13, 1755. D. POOLE.

CASE 6.

A. B. tenant for life of an impropriate rectory, with remainder to *F.* in fee, purchaſes an eſtate in the rectory, liable to the payment of tithes, which ſhe afterwards conveys to her ſon. *A. B.* lives for near forty years afterwards, and during that period never demands tithes. Upon her death the ſon refuſing to pay them to *E.* the remainder-man—Mr. Wilbraham's Opinion, Whether they are recoverable? and, upon what evidence.

A. B. about fifty years ſince, purchaſed an eſtate in *C.* which at that time paid tithes (as it is preſumed); and the ſaid *A. B.* ſome years afterwards conveys the ſame to *D.* her ſon, who hath been ever ſince, and is now, in the poſſeſſion thereof.

Note, It is an impropriation. The ſaid *A. B.* at the time of the purchaſe was ſeiſed of the *tithes of C.* and held the ſame by jointure for life; and on her death, which was about eight years ſince, the *jointure eſtate of tithes* deſcends to *E.* who is now the poſſeſſor thereof.

The

The ſaid *A. B.* after the purchaſe as above made, being ſeiſed both of the ſame eſtate and alſo the tithes of *C.* held the ſame together for many years; and, as may be very reaſonably preſumed, did not, during that time, pay tithes for the purchaſed eſtate to herſelf; neither after the conveyance thereof made to *D.* her ſon, did ſhe, during her life, demand of him tithes, or ſubject him to the payment thereof.

Quere (by Mr. Wilbraham), What is the nature of this eſtate of tithes? Is it an impropriate rectory, or not?—This will appear from the ſettlement.

The ſaid *E.* who is now ſeiſed and poſſeſſed of the tithes of *C.* by deſcent as before, hath, ſince the death of *A. B.* yearly demanded, and now continues to demand, of *D.* the tithes of this eſtate, or ſome compoſition in lieu thereof. But the ſaid *D.* being executor of the ſaid *A. B.* and on her death having got into his poſſeſſion all her papers and books wherein the account of payments and compoſition monies for tithes have been uſually entered, and therein the payment and compoſition money for this eſtate before the original purchaſe thereof made by *A. B.* refuſeth the payment of tithes; well knowing that *E.* will be greatly diſtreſſed thereby, in point of proof of payment of tithes, for want of theſe papers and books.

There are ſeveral witneſſes living who can prove that they have heard, that the proprietor of the eſtate before the purchaſe made by *A. B.* paid tithes for the ſame, and had ſuch a proportion of ground aſſigned and allowed him yearly for agiſting the plough beaſt uſed about the tillage lands.

Whether upon the face of the whole Caſe, the ſaid *E.* can recover of the ſaid *D.* tithes of this eſtate? and, Whether a preſcription only for above forty years, if pleaded by *D.* to be diſcharged from payment of tithes, will be a ſufficient diſcharge from payment, as no compoſition or payment in lieu thereof hath been, or is now, made by *D.* in reſpect of the ſaid eſtate? and, Whether a bare preſcription pleaded time immemorial from payment of tithes (without aſſerting that the eſtate formerly belonged to ſome Religious Houſe or Order, and ſo derive the title down to this preſent time) will amount to a diſcharge of payment of tithes? and, Whether it will be neceſſary for *E.* in order to recover tithes of this eſtate, to prove abſolute payment of tithes, or ſome compoſition in payment made in lieu thereof, and not by hearſay only; the former whereof is difficult for him to do, as the ſaid *D.* hath the books of payment in his cuſtody?

1. Quære.

AS

Anſwer. AS this is an impropriate rectory which *E.* now claims as next in remainder after *A. B.* the jointreſs's death; as *D.* can ſhew no exemption for the payment of tithes; as it is ſaid it now appears, that tithes were paid for thoſe lands before ſhe purchaſed the eſtate; as her unity of poſſeſſion of the rectory and lands accounts for the non-payment of tithes during ſuch unity; and as there was given an unity of poſſeſſion after ſhe conveyed the eſtate to her ſon *D.*; I therefore think, that *E.* may, as impropriate rector, recover the tithes of this land from *D.* by a bill in equity; and the non-payment during the interval above-mentioned will not, I think, be any bar to ſuch demand.

2. Quære. What evidence and proof will be deemed neceſſary to entitle *E.* to his tithes of this eſtate? no other diſcharges than as before can be pleaded by *D.*: and, Whether as the ſaid *E.* had no claim to a demand of tithes till after the death of *A. B.* and extinction of her jointure, upon which the ſame deſcended to *E.* it will not be ſufficient to prevent any laches in reſpect of time only pleaded to be diſcharged? and, Whether, on proof of the ſettlement and the death of *A. B.* it will not be deemed ſufficient to ſet aſide ſuch a diſcharge if pleaded?

Anſwer. This queſtion is in effect anſwered on the other ſide; but it will be neceſſary, or at leaſt proper, to prove the ſettlement, in order to account for the non-payment by unity of poſſeſſion.

3. Quære. What method would be the moſt adviſeable for *E.* to proceed againſt *D.* for the recovery of the tithes? and, Whether it would not be adviſeable for *E.* as moſt of his witneſſes are old, to eſtabliſh their teſtimony *in rei memoriam* with the utmoſt expedition?

Anſwer. I THINK, it would be proper to proceed by a bill in equity; and in caſe the witneſſes who can prove the payment of tithes before the purchaſe of the eſtate are very

very aged, then it may be proper to file a bill immediately, and to procure an order upon a proper affidavit to examine them *in perpetuam rei memoriam.*

Lincoln's-Inn, R. WILBRAHAM.
January 13, 1753.

CASE 7.

The owner of the corn having ſet forth the tithe in the abſence of the tithe-man, and having afterwards removed the ſame into a different field, upon its not being carried away in due time by the leſſee of the tithes—Mr. Perrott's Opinion, Whether an action was maintainable by the latter?

——CHARTERIS, eſq. is the impropriator of all the corn tithes within the pariſh of Ormſkirk, of which Lathom is part; and James and John Foſter, two brothers, by virtue of an aſſignment or otherwiſe from the leſſee thereof, are entitled to the corn tithes of that part of Lathom called Weſthead, in which one William Brighouſe hath an eſtate; who ſome time in the winter 1754 demiſed it to Thomas Spencer for a term of years at a rack-rent: but before that time ſaid Brighouſe had ſown a field, containing two acres and a half, or thereabouts (part of ſaid farm), with wheat; and it was agreed between them, that ſaid Brighouſe ſhould have three-fourths of ſaid wheat for his trouble in ſummer working, and finding ſeed, &c. and Spencer the tenant to have the remaining one-fourth to anſwer the rent of the ſaid field for that year: and before any of the ſaid field of wheat was cut down, ſaid Spencer purchaſed Brighouſe's ſhare; ſo that Spencer was then the ſole owner of the whole field of corn.

In September laſt, ſaid Spencer having cut the greateſt part of the ſaid wheat, and being ready for houſing, and Foſters' tithe-man, Caperſon (whom they employ to ſee the tithe ſet out), not coming in time, he got one Hugh Smith, a very honeſt man, who was reaping for him, to do it; who accordingly begun in the uſual way to ſet it out, and had marked only two tithe hattocks, when one of the Foſters came into the field, and went to Smith, and aſked him, What he was doing? who told him, that as the weather ſeemed to be very precarious and unſettled, Spencer had reſolved to houſe the corn that day, and the tithe-man not coming, had deſired him to ſet out the tithe. On which Foſter put himſelf into a great paſſion, and threatened them with law; and Brighouſe and Spencer being both there, told him, if he did not approve of the hattocks which Smith had ſet forth

forth for the tithe he might take the twelfth, or any other, inſtead of the eleventh hattock, which is the cuſtomary tithe in this pariſh; but nothing would ſatisfy him; and after a good deal of abuſive language he went away: and immediately after his departure his tithe-man came, whom they acquainted with what had paſſed between them and Foſter; and Spencer told the tithe-man, if he did not like either of the hattocks which Smith had ſet forth, he might take others. On which the tithe-man went amongſt the corn, and declared he ſaw nothing amiſs, and ſet out the tithe of the whole field himſelf; and inſtead of one the two tithe hattocks which Smith had ſet out, he marked the next to it. Notwithſtanding which, Foſters have never taken the tithe away, but ſuffered it to remain on Spencer's ground, were it continued ſixteen days after his corn was taken away; and then Spencer having an urgent occaſion to turn his cattle into this field, which he had omitted for ſome time on this account, and knowing that if he turned his cattle amongſt the tithe-corn, by their eating ſo greedily thereof as they would do, it would deſtroy them, he then removed the corn into another field, and ſet it up in hattocks, where it now ſtands, and turned the cattle into the field where the corn grew; and gave Foſters notice, that unleſs they fetched away the tithe it would be thrown out of the field, or Spencer would expect to be paid for damages done to him in its ſtanding there, and depriving him of the uſe of his ground in eating the eddiſh or after-graſs; but they ſtill ſuffer it to remain there.

Note, Before Spencer removed the tithe-corn out of the field where it grew, Foſters had taken out a writ of *quo minus*, and ſerved both him, Brighouſe, and Smith, with copies, but have not yet declared.

Quære. Do you think Foſters can maintain any and what action againſt Brighouſe, Spencer, and Smith, or any of them, upon the ſtate of this Caſe? and, Was it not the regular method for the owner of the corn to ſet out the tithe himſelf, as he is puniſhable by law if he does not? and, Is Spencer wrong in removing the corn out of the field where it grew, being neceſſitated ſo to do, in order to eat the graſs, which his cattle very much wanted? and, Whether he may throw the tithe corn out of his field into the highway, or ſuffer it to ſtand there? and if ſo, Can he maintain an action againſt Foſters for the damage done to his ground? and, Will the removal of it

thithe

thither make any difference? and upon the whole, What is moſt adviſeable in this Caſe for Spencer to do with the corn, which is now ſpoiling, beſides the great inconvenience and loſs to him in having it there?

I THINK, Foſter cannot maintain any action againſt Brighouſe, Spencer, or Smith; for the tithes appear to me to be duly ſet out, the owner of the corn being bound to ſet out the tithes; and I think, Foſter having ſuffered the tithe to continue ſo long upon the ground, Spencer may juſtify taking it by way of diſtreſs *damage feaſant*; and in that light may juſtify the removing it. But I think, he cannot juſtify throwing it into the highway, nor bring an action againſt Foſter for the damage done to his ground, which he might have done if he had not removed it. But if he will admit the removal to be wrong, then I think, he may bring an action for the damage done in the field where it firſt grew; but I think, now he muſt let it periſh on the ground where it is. Anſwer.

Inner Temple, GEO. PERROTT.
November 21, 1755.

CASE 8. The proprietors of the lands of one of the leſſer abbeys, belonging to an Order diſcharged by the Council of Lat ran from the payment of tithes for lands *in propriis manibus*, claiming an exemption from the payment of tithes —Mr. GIBSON's OPINION upon the evidence requiſite to be adduced in ſupport of their pretenſions.

HENRY VIII. 20th May, in the 27th year of his reign, did grant to James Brown the manor or lordſhip of Weſthoughton, *in com. Lanc.* parcel of the poſſeſſions of the then late diſſolved abbey of Cockerſand in the ſaid county, with all privileges, &c. to hold to the ſaid James Brown, his heirs and aſſigns, for ever.

THE occupiers of lands there have all along paid tithes; but being lately informed, that the ſame were parcel of the ſaid diſſolved abbey, are mindful to uſe all proper methods to exempt them from ſuch payment, if they may be adviſed that the lands are diſcharged as being parcel of the poſſeſſion of one of the greater abbies, notwithſtanding their conſtant payment of tithes to this time.

THE ſaid occupiers have taken out of the Augmentation Office a copy of the miniſter's account, whereby it appears

pears that the ſaid manor of Weſthoughton was parcel of the ſaid diſſolved abbey at the time of its diſſolution:

Quære. ARE the occupiers of land exempt from the payment of tithes, as being part of the poſſeſſion of the ſaid abbey at the time of the diſſolution thereof? or, Is it neceſſary to prove them ſo at the time of the grants of exemption to the abbot, ſo as to partake of that privilege? and, Will ſo long a payment of tithes be a great evidence againſt them? and, Whether is there any hopes or encouragement for the men of Weſthoughton to diſpute the payment of tithes? and if ſo, What ſteps are moſt adviſeable to be taken by them for that purpoſe?

SEE copies of records in this Caſe, *poſt*.

Anſwer. THE abbey of Cockerſand (though one of the leſſer abbies, yet continued by letters patents till the 31. Hen. 8.) was one of the Præmonſtratenſian Order, which was one of the Orders diſcharged by the Council of Lateran (held in the year 1215) from the payment of tithes for lands *in propriis manibus*.

THIS council was a general law received in England, and freed all the lands which thoſe of that Order then had from payment of tithes *dum propriis manibus*; which exemption is continued to the proper owners of lands, by the ſtat. 31. Hen. 8.

BUT the diſcharge was, by that council, confined to ſuch lands as the Order then had; ſo as any lands acquired by them after that Council were not entitled to that privilege.

IF therefore it can be anyways made appear, that the manor of Weſthoughton belonged to the abbey of Cockerſand in or before the year 1215, I think, the owners of the inheritance now ought *dum propriis manibus* to be exempt from payment of tithes.

OTHERWISE, I think, the conſtant payment that has been of tithes by the owners of the inheritance, as far as memory can go, will be an evidence, that the manor did

did not belong to the abbey at the time of the Council of Lateran, nor had any right to the privilege of exemption from tithes at the diſſolution of the monaſtery, and therefore has paid ever ſince, and ought ſo to do.

If the tenants are minded to try this matter, ſome of the proper owners and poſſeſſors may retain their tithes, and put the impropriator upon ſuing for them, and make the exemption in reſpect of order their defence.

March 25, 1726. RO. GIBSON.

Copies of records.

" HENRY THE EIGHTH, by the grace of God, " king of England, France, and Ireland, defender of the " faith, and over the church of England and Ireland " ſupreme head and governor upon earth, to all people " and perſons to whom theſe our preſent letters ſhall " come, greeting: Know ye, that we, for the ſum of " one thouſand and five-and-thirty pounds eleven ſhillings " and eight-pence, of lawful money of England, well and " faithfully paid to the hands of the treaſurer of the court " for the augmentation of the revenues of our crown for " our life, by our well-beloved ſubject James Brown, " citizen and haberdaſher of London, wherewith we do " confeſs ourſelves to be fully contented and ſatisfied, " and thereof to have acquitted and diſcharged him the " ſaid James Brown, his heirs, executors, and admini- " ſtrators, by theſe preſents have, of our ſpecial grace, " and of our certain knowledge and mere favour, given " and granted, and by theſe preſents do give and grant, " unto the aforeſaid James Brown all that our lordſhip " or dominion and manor of Weſthoughton, with all " and every its rights, members, and appurtenances, in " our county of Lancaſter, anciently belonging and " appertaining, and of late being parcel of the poſſeſſions " of the late monaſtery of Cockerſand, in our ſaid county " of Lancaſter, which is now diſſolved; and all meſſuages " granges, milnes, houſes, edifices, tofts, cottages, lands, " tenements, meadows, feedings, paſtures, commons, " woods, waſtes, waſte grounds, moors, marſhes, turbaries, " waters, fiſh-ponds, fiſhings, rents, reverſions, ſervices, " fines, amerciaments, heriots, wards, marriages, eſtreats, " reliefs, courts leet, viſne franck-pledge, chattels,

" waifs, ſtrays, goods of felons and fugitives, free warrens,
" and all things that belong to free warren, aſſize, aſſize
" of bread wine and beer, and all other our rights,
" juriſdictions, liberties, franchiſes, privileges, profits,
" commodities, emoluments, and hereditaments whatſo-
" ever, with their appurtenances, ſituate, lying, and being,
" in Weſthoughton and Preſton in Amoundernes, in our
" ſaid county of Lancaſter, or elſewhere whereſoever,
" in anywiſe appertaining or belonging unto, or heretofore
" had, known, accepted, uſed, or reputed to be, as member
" or parcel of the ſaid lordſhip and manor; and all other
" the manors, meſſuages, granges, burgages, milnes, lands,
" tenements, meadows, feedings, paſtures, woods, com-
" mons, turbaries, waters, fiſh-ponds, fiſhings, waſtes,
" waſte grounds, courts leet, viſne franck-pledge,
" chattels, waifs, ſtrays, and free warrens, and other our
" rights, profits, commodities, emoluments, and heredita-
" ments whatſoever, with the appurtenances, in the vil-
" lage and circumferences of Weſthoughton and Preſton
" in Amoundernes, in the ſaid county of Lancaſter,
" antiently belonging or appertaining unto the ſaid late
" monaſtery, or heretofore had, known, accepted, uſed,
" or now reputed to be, as parcel of the poſſeſſions and
" revenues of the ſame late monaſtery, and the reverſions
" whatſoever of all and ſingular the premiſes, and of every
" part thereof; and alſo all and every the rents and yearly
" profits whatſoever reſerved upon all or any the demiſes
" and grants of the premiſes, or of any part thereof,
" in any wiſe; and as fully, freely, and abſolutely, as the
" laſt abbot of the ſaid late monaſtery, or any one or any
" of his predeceſſors, in right of the ſaid late monaſtery,
" at any time before the diſſolution of the ſaid late mo-
" naſtery, or before the ſaid late monaſtery came into
" our hands, did have, hold, or enjoy, or have held or
" enjoyed, or did or ought to have had, held, or enjoyed,
" the ſaid manor, meſſuages, lands, and all and ſingular
" the reſt of the premiſes, or any parcel thereof; and
" as fully, freely, and abſolutely, as the ſame, and all and
" every of them, by force and virtue of the diſſolution
" of the ſaid late monaſtery, or by force and virtue of any
" act of parliament, or by any other way or means, of
" right, came or ought to come into our hands, and now
" of right are, or ſhould, or ought to be, in our hands and
" poſſeſſion. And further we do give, and for the con-
" ſideration aforeſaid do by theſe preſents grant, unto the
" before-

" before-mentioned James Brown, the before herein-men-
" tioned manor, meſſuages, lands, and all and ſingular other
" the premiſes, with their appurtenances, and in every part
" thereof, ſo many ſo large, the ſame or the like courts leet,
" viſne franck-pledge, and all things which belong to the
" viſne franck-pledge, aſſize, aſſize ſo bread wine and beer,
" chattels, waifs, ſtrays, goods of felons and fugitives,
" free warrens, and all other the rights, juriſdictions,
" liberties, franchiſes, privileges, profits commodities,
" emoluments, and hereditaments whatſoever, either for
" number, quantity, or quality, and as fully, freely, and
" abſolutely, as the ſaid laſt abbot of the ſaid late monaſtery
" of Cockerſand, or any one or any of his predeceſſors, in
" the right of the ſaid late monaſtery, at any time before
" the diſſolution of the ſaid late monaſtery, or before the
" ſaid late monaſtery came into our hands, did have, hold,
" or enjoy, or have had, held, or enjoyed, in the aforeſaid
" lordſhip, manor, lands, and other the premiſes, or in any
" part thereof, by reaſon or colour of any charter, gift,
" grant, or confirmation, or any letters patents, by us,
" our, or any of our progenitors, kings of England,
" made, granted, or confirmed, to the aforeſaid late abbot
" of the ſaid late manaſtery, or to any of his predeceſſors,
" by force or colour of any preſcription, uſe, or cuſtom,
" heretofore had or uſed, or by any other means what-
" ſoever; which ſaid lordſhip and manor, and other the
" premiſes, with the appurtenances, are now rated or
" extended to the clear yearly value of ſeven-and-fifty
" pounds ſix ſhillings and eleven pence halfpenny; to have
" and to hold the ſaid lordſhip and manor of Weſthoughton,
" and all the ſaid meſſuages, granges, milnes, houſes,
" edifices, cottages, lands, tofts, tenements, meadows,
" feedings, paſtures, commons, waſtes, waſte grounds,
" turbaries, waters, rents, reverſions, ſervices, courts leet,
" viſne frank-pledge, franchiſes, liberties, and all and
" ſingular the reſt of the premiſes above ſpecified and
" expreſſed, with their and every of their appurtenances,
" unto the aforeſaid James Brown, his heirs and aſſigns,
" for ever, to the proper uſe and behoof of him the ſaid
" James Brown, his heirs and aſſigns, for ever, to hold
" of us, and our heirs and ſucceſſors, in chief, by the
" ſervice of the twentieth part of a knight's fee; and to pay
" therefore yearly unto us, our heirs and ſucceſſors, five
" pounds fourteen ſhillings and eight pence halfpenny of
" lawful money of England, at the ſaid court for the aug-
" mentation

" mentation of the revenues of our crown, to be paid yearly
" at the Feaſt of St. Michael the Archangel, for all rents,
" ſervices, and demands whatſoever, to be from henceforth
" yielded, paid, or performed, unto us, our heirs and
" ſucceſſors, in anywiſe. And we do further give, and
" for the aforeſaid conſideration do by theſe preſents grant,
" unto the ſaid James Brown, all the iſſues, rents, rever-
" ſions, and profits, of all and ſingular the ſaid manor,
" meſſuages, lands, tenements, and the reſt of the premiſes
" above expreſſed and ſpecified, with their appurtenances,
" and every parcel thereof, from the feaſt of the Annun-
" ciation of the Bleſſed Virgin Mary laſt paſt unto this pre-
" ſent time, and ſo for time to time to come, to have unto
" him the ſaid James Brown, of our gift, without account
" thereof given, or in anywiſe yielding, paying, or per-
" forming, any thing therefore unto us, or to our heirs or
" ſucceſſors. And furthermore of our more ſpecial grace
" we will, and for us our heirs and ſucceſſors, for the
" conſideration aforeſaid, do by theſe preſents grant unto the
" ſaid James Brown, his heirs and aſſigns, that we, our
" heirs and ſucceſſors, ſhall and will, year by year, and
" from time to time for ever, diſcharge, acquit, and
" indemnify, as well the ſaid James Brown, his heirs and
" aſſigns, as alſo the ſaid manor, meſſuages, lands, and all
" and ſingular other the premiſes, with their appurtenances,
" and every part thereof, as well againſt ſir Thomas Stan-
" ley, knight lord Mounteagle, by reaſon of his office, of
" the chief-ſteward or ſtewardſhip of the ſaid manor, and
" of the reſt of the premiſes, of and from all fees, commo-
" dities, advantages, liberties, and pre-eminences whatſo-
" ever, belonging or appertaining to him the ſaid lord
" Mounteagle by reaſon or colour of his ſaid office, as
" alſo againſt us, our heirs and ſucceſſors and againſt all
" others perſons whatſoever, for all and all manner of in-
" cumbrances, rents, annual fees, and payments of money
" whatſoever, in anywiſe iſſuing or payable out of the
" premiſes, or thereupon charged or chargeable; and alſo
" for the rents and ſervices above by theſe preſents reſerved
" to us, our heirs and ſucceſſors; and likewiſe for the
" demiſes of the premiſes, or of any part thereof; and alſo
" for the charges or impoſitions which the preſent farmers
" of the premiſes are obliged to diſcharge And we will
" alſo, and by theſe preſents do ſtedfaſtly enjoin and com-
" mand, as well the chancellor and council of the court
" for the augmentation of the revenues of our crown, as

" alſo

"also the receivers, auditors, and other our officers and "ministers whatsoever, who for the time being are or shall "be appointed by us, or by our heirs and successors, that "they and every of them, upon sight and demonstration "only of these our letters patents, or upon the inrolment "of the same, without any other writ or warrant to be in "anywise obtained from us, or from our heirs or suc-"cessors, or prosecuted, shall and do make, or cause to be "made, unto him the said James Brown, his heirs and "assigns, from time to time, a full and absolute allocation "and manifest discharge of and from all, and all and every, "the said incumbrances, rents, annual fees, and payments "of money whatsoever, issuing or chargeable out of the "premises, or thereupon charged or chargeable as is "aforesaid (except what is before excepted); and these "our letters patents, or the inrolment of them, shall be "from year to year, and time to time, as well unto the said "chancellor and council of the said court for the augmen-"tation of the revenues of our crown, as also to all re-"ceivers, auditors, and other the ministers and officers "whatsoever, either of us or of our heirs and successors, "for the time being, a sufficient warrant and discharge in "that behalf. And we likewise will, and by these presents "grant, unto the said James Brown, that he have, and shall "or may have, these our letters patents made and sealed, "after the usual manner, under our great seal of England, "without fine or fee, either great or small, to be therefore "in anywise yielded, paid, or performed, to us, either "into our treasury or in any other place for our use, to the end "that express mention may be made of the true annual value "and certainty of the premises, and of other the gifts "and grants (not in these presents) which have been made "by us, or any of our progenitors, unto the said James "Brown before these times, any statute, ordinance, "proviso, or restriction, to the contrary thereof made, "published, ordained, or provided, or any other thing, "cause, or matter whatsoever, in anywise notwithstand-"ing. In testimony whereof we have made these our let-"ters patents. Witness ourself at westminster, the three-"and-twentieth day of May, in the seven-and-twentieth "year of our reign.

"By him the said king, by virtue of his said
"majesty's commission,

"HALES."

"Jovis

Decree in the Exchequer in the foregoing Caſe.

"*Jovis*, 21 *die Novembris*, 1723. WHEREAS Joſ. "Lambert, gent. did in Michaelmas Term, in the 7th "year of his preſent majeſty's reign, exhibit his Engliſh "bill of complaint in this court againſt Edward Cumming "and others defendants, thereby ſetting forth, that the "dean and chapter of Worceſter, by their indenture of "leaſe, dated the 12th September 1712, did demiſe to the "plaintiff, for the term of twenty one years, all tithes, "great and ſmall, of all ſorts, of the rectory and parſonage of "Warton, in the county of Lancaſter; that the defendants "had for five years then laſt paſt divers titheable matters "growing on the lands they held in the ſaid pariſh, and "offerings, oblations, and other dues, to which the com- "plainant had right, which they refuſed to pay or ſatisfy "him for; that the defendant Cumming and his mother, "jointly or ſeverally, had in thoſe years ſeveral quantities "of hay, corn and other titheable matters, on the land "they held in the ſaid pariſh, which they pretended were "antient glebe lands, and therefore exempt from paying "tithes in kind; that they had alſo depaſtured many ſheep "and other cattle; and on the ſame pretence refuſed to "pay tithes wool and lamb: and the bill charged, the "defendants lands were made under no legal protection; "and that they fed their ſheep and other cattle on Yealand "Common in the ſaid rectory; and had ſeven ſeveral "parts of common or moſs near their eſtates at Moſs-ſide, "with corn and grain, for which they refuſed to pay tithes, "or diſcover the particulars or value of any of the premiſes, "and refuſed to pay Eaſter dues, obventions, and oblations, "for any part of the ſeven years the ſaid plaintiff had "poſſeſſed the ſame premiſes: therefore, that the "defendant might anſwer the premiſes, and the plaintiff "might be relieved, was the ſcope of the plaintiff's bill. "To which ſaid bill the defendant Cumming, being duly "ſerved with proceſs of this court, appeared and anſwered; "and by his anſwer ſaid, he knew not that the plaintiff "was entitled to the tithes of the ſaid rectory; and con- "feſſed he was, during the time in the bill, owner and "occupier of an eſtate called Hillderſtone, in the ſaid "rectory of Warton, conſiſting of one meſſuage and "garden and orchard, &c, all which meſſuage, lands, and "premiſes, with the appurtenances (amongſt other things), "by letters patents, dated the twenty-third of March, "in the thirty-ſixth year of Henry the Eighth, were granted "unto John Braddyll, his heirs and aſſigns, for ever.

"Under

" Under which letters patents the defendant claimed the " ſame; and ſaid, he was credibly informed by divers " antient perſons, well acquainted with the ſaid rectory of " Warton that no impropriator or leſſee thereof was " entitled, or ever took or received any tithes in kind, " or any thing in lieu thereof, for any titheable matters " and things that did ariſe and happen upon the ſaid eſtate; " and the defendant inſiſted, that the ſame were parcel of " the diſſolved abbey of Cockerſand, in the county palatine " of Lancaſter, which was one of the greateſt monaſteries, " and came to the crown by the ſtatute of the 31, Hen. 8. " and were held and enjoyed always, and at the time of the " diſſolution, by the abbot and convent of Cockerſand, " freed and diſcharged from the payment of any tithes in " kind, or any rate, *modus*, or compoſition, in lieu thereof, " and have been ſo enjoyed ever ſince the diſſolution of the " ſaid monaſtery by the perſons claiming under the crown; " and ſaid (he believed), that the plaintiff, or any former " leſſee of the ſaid rectory never before this ſuit pretended " to demand any tithes of the ſaid eſtate; and was adviſed, " that ſuch exemptions was not loſt by the diſſolution of " the abbey, but that privilege continued by virtue of the " ſtatute of diſſolution or otherwiſe; and that as owner " and occupier he ought to have the advantage of ſuch " diſcharge: and ſhewed, that he and his predeceſſors " had enjoyed the ſaid eſtate above a hundred years " diſcharged from tithes, or any thing in lieu thereof; " and ſhewed, that he was informed, that the ſaid abbot and " convent did, before the diſſolution, hold and enjoy, by " virtue of the eſtate aforeſaid, a right of common called " Yealand Common, which, ever ſince the ſaid diſſolution, " had been enjoyed by the owners of the ſaid abbey lands, " exempt from the payment of tithes, or any thing in lieu " thereof; and that he and his anceſtors, by virtue of the " ſaid eſtate aforeſaid, had enjoyed, time out of mind, " a right of common on the ſaid Yealand Common; " that the ſaid right of common was appurtenant to the " eſtate, and ſo had been always exempt as aforeſaid; " and inſiſted, that the benefit ariſing by ſuch right of " common ought to be likewiſe exempt from the payment " of tithes; and that no tithes of the ſame were ever paid " or demanded but by the plaintiff, &c.: denied that " he pretended the lands were glebe, and ſo exempt; " but inſiſted, that the abbey lands were exempt: and " denied combination; and concluded with the general " traverſe. Unto which anſwer the plaintiff replied,

" and

" and the defendant rejoined; and divers witneſſes were " examined on either ſide: and their depoſitions being " duly publiſhed, and the cauſe put into the paper of " cauſes, came, this preſent 21ſt of November, to be heard " in the exchequer chamber at Weſtminſter, before the " honourable Robert Price, eſq. ſir Francis Page, knt. and " Jeffery Gilbert, eſq. three of the barons of this court; " where, upon opening the plaintiff's bill by mr. Bootle, " of counſel for the plaintiff, and of the defendant by mr. " Wergh, of counſel with the defendant; and on hearing " of mr. Ward, and of the ſaid mr. Bootle, of counſel with " the plaintiff, and mr. ſergeant Pengelly, mr. Brown, and " the ſaid mr. Wergh, of counſel with the defendant; " and on reading of *a ſurrender* of the abbot of the abbey of " Cockerſand, in the county of Lancaſter, to the crown, " in the 30th year of the reign of king Henry the Eighth, " being a record out of the *augmentation office*, and of " another record out of the *rolls of letters patents* from the " crown to John Braddyll, dated the 23d of March, in the " 36th year of the ſaid late king Henry the Eighth, and the " *miniſter's account* of the 35th year of Henry the Eighth, " being a record out of the *augmentation office*, whereby " it appears that the ſaid abbey of Cockerſand was one " of the greater monaſteries, and of the proofs taken in the " cauſe; and on hearing of what was inſiſted on by " counſel on either ſide, the court declared the defendant's " eſtate called Hillderſtone, and the lands thereunto be- " longing, inſiſted on by the defendant, in his anſwer, " to be diſcharged from any manner of tithes, were " exempt from the payment of any manner of tithes; and " that right of common upon Yealand Common was " appurtenant to the ſaid eſtate called Hillderſtone, and " was likewiſe exempt from the payment of tithes.

" AND it is thereupon this day ordered and declared " by the court, that as to the defendant's ſaid eſtate called " Hillderſtone, and the land and right of common thereunto " belonging, is declared by the court to be exempt from " the payment of any manner of tithes as aforeſaid.

" THE plaintiff's bill ſhall be, and is hereby, diſmiſſed " out of this court, with coſts of that ſuit, to be taxed by " the deputy of his majeſty's remembrancer of this " court.

" ROB. PRICE.
" FR. PAGE.
" JEF. GILBERT.

The

The CASE *of the* PARISHIONERS *of the* PARISH *of* ST. PETER'S, *within the* DIOCESE *of* LONDON, *concerning* SMALL TYTHES.

CASE 9. Sir CONSTANTINE PHIPPS'S OPINION upon ſeveral Queſtions reſpecting the payment of ſmall tithes.

THE preſent vicar of the ſaid pariſh having very much enlarged, raiſed, and encreaſed the ſaid ſmall tithes in the ſaid pariſh, the ſaid pariſhioners deſire to be anſwered theſe following Queries, (*viz.*).

WHETHER the pariſhioners are to carry the ſame to the vicar? or, Whether the vicar is not obliged to ſend for the ſame to the pariſhioners places of habitation? 1. Quære, Tithe Milk.

I CONCEIVE the pariſhioners are not obliged to carry their ſmall tithes to the vicar, but he is obliged to fetch them. Anſwer.

How the tithe of calves is to be paid to the vicar, if bought and ſuckled in home breed? 2. Quære, Tithe Calves.

FOR calves fallen in the pariſh, the tenth is due for tithe, unleſs there be a particular cuſtom for tithing calves in the pariſh; but for calves bought in, and ſucklers, no tithes are due. Anſwer.

How the tithe of dry cows of the farmer's own, and cows and horſes of others taken in to winter with hay and ſtraw, is to be paid to the vicar? or, If any tithes due? 3. Quære, Tithe Cows.

If the farmer's own cows and horſes, and other perſons, are only fed in the winter upon hay and ſtraw, and not grazed, I am of opinion no tithes are due; but if they are grazed at all, tithes muſt be paid for ſuch grazing after the rate of two ſhillings in the pound, according to the value of the herbage. Anſwer.

WHETHER ſheep and lambs bought, and killed in the farmer's own houſe in a little time after ſo bought, ought to pay tithe? and, In what manner, if any? 4. Quære, Tithe Sheep.

I AM

Anſwer. I AM of opinion, that ſheep and lambs bought and killed in the farmer's own houſe ought to pay tithe for the time they were fed in the pariſh, after the rate of two ſhillings in the pound of the value of the herbage, unleſs there be any particular cuſtom in the pariſh for the payment of tithe for depaſturing of ſheep.

5. Quære, Tithe Lambs. How lambs bred and fattened, or kept for ſtores, ought to pay tithe? and, At what age they are to be tithed?

Anſwer. I AM of opinion, that tithes ought to be paid for lambs bred and fattened for ſtores, and that ſuch lambs are titheable when they are able to live without the ewes.

6. Quære, Tithe Pigs. How pigs are to be tithed, and at what age, and out of what number the vicar can claim or demand one?

Anſwer. PIGS are titheable when they can live without the ſow; and the vicar is entitled to one in ten, unleſs by the cuſtom of the pariſh there be any other particular manner of tithing pigs.

7. Quære, Tithe Eggs. WHETHER the vicar can take tithe eggs and tithe chickens both at one time, the chickens coming out of the eggs that were tithed before?

Anſwer I AM of opinion, if the vicar take tithe of eggs, he is not entitled to the tithe of the chickens coming out of thoſe eggs of which he had tithe.

8. Quære, Tithe Horſes. WHETHER the vicar can take tithe for the farmer's own horſes which they plough and ſow and till theirown land with?

Anſwer. TITHES are not due for horſes uſed for the plough on the farmer's own farm in the ſame pariſh.

9. Quære Tithe Fruit. WHETHER the pariſhioners are to houſe the fruit when gathered for the vicar, or ſet them out on the ground where they are gathered? If loſt by the neglect of the vicar's ſending for them, Whether the vicar ſhall not bear the ſaid loſs.

I AM

I AM of opinion, the parishioners are not bound to house the tithe fruit, but the tithe fruit ought to be set out upon the ground; but notice ought to be given to the vicar when the fruit is gathered; and if it be spoiled by reason of his not fetching away his tithe in due time, he must bear the loss. Answer.

WHETHER turnips which fattened sheep ought to pay tithe, when the said sheep have paid tithe wool before, or eaten with store sheep and lambs that will pay tithe wool afterwards? 10. Quære, Tithe Turnips.

IF the turnips are drawn, and afterwards eaten by sheep, tithes are due for such turnips: but if the turnips are not drawn, but eaten upon the ground, no tithe is due for such turnips, but only a tithe herbage for such sheep as are not thereon, nor have any lambs in the parish. Answer.

WHAT tithe of pigeons are due to the vicar from those that keep them, and rent dove-houses? 11. Quære, Tithe Pigeons.

TITHES are due for young pigeons, and the vicar is entitled to the tenth of the value if they are sold. Answer.

WHETHER meadow land that has paid tithe grass to another person, ought to pay tithe again for the after-pasture to the vicar for the same year? 12. Quære, Tithe Grass.

I AM of opinion, that the occupier, having paid tithes for the hay to the rector, ought not to pay tithe for the agistment of cattle to the vicar for the after-pasture in the same year. Answer.

Middle-Temple,
16th February 1719. CON. PHIPPS.

THE

CASE 10. The OPINION of Sir CONSTANTINE PHIPPS upon ſeveral Queſtions relating to the payment of tithes.

THE pariſh of South Mims not having at any time paid their ſmall vicarial tithes in kind, but a rate of three pence *per* pound inſtead thereof, and the preſent vicar inſiſting for the future to take the ſame in kind, they deſire to be informed of the method and manner the law preſcribes for the payment of the ſame; whereas in this caſe there is no cuſtom to guide them in any of the particulars.

1. Quære. How the tithe for depaſturing barren cattle is to be paid, whether according to the value of the ground, or the tenth penny for which ſuch cattle is ſold? and, if in the laſt caſe, If the prime coſt is to be deducted? and, Whether it is to be paid according to ſuch proportion of time as ſuch cattle feed thereon? and, How ſuch proportion is to be made? or, If the vicar is in any caſe entitled to a tenth penny unleſs by cuſtom?

Anſwer. IF the occupier of the land takes in cattle of others to agiſt, *the tenth part of the money received* (as I take it) is payable: for agiſtment for his own cattle fed thereon, tithes are to be paid, *according to the value of the land*, after the rate of two ſhillings in the pound for the tenth of the value on the feeding; to be eſtimated for the time they ſhall be fed: but I know of no ſuch rule of paying the tenth penny of what ſuch cattle is ſold for.

2. Quære. IF ground be eaten with profitable as alſo with barren and unprofitable cattle, if the greater part of ſuch cattle, being unprofitable, ſhall free the reſt?

Anſwer. TITHE muſt be paid for the unprofitable, and the profitable will not exempt the reſt.

3. Quære. IF any tithes are to be paid for after-paſture, fallow or corn ſtubbles, or for any cattle or fattened oxen or the like to be fed thereon, or for the milk of milch cows when they go on ſuch after-paſture, fallow or corn ſtubble?

OF common right no tithes are to be paid for cattle fed on after-paſture, &c. but the milk of cows, being of a different

ferent increaſe, will be payable while they go on ſuch after-paſture, fallow and ſtubble land.

WHETHER if barren cattle are fed partly upon after-paſture and partly upon paſture-ground, How the tithe of ſuch cattle is to be paid? 4. Quære.

TITHE is to be paid for the time they feed upon paſture-ground; and it is the pariſhioner's intereſt who claims any diſcharge, *to diſtinguiſh how long* they were fed upon ſuch ground, and how long upon after-paſture. Anſwer.

IF any tithes are to be paid for milk of cows whilſt they feed upon hay, which before has paid tithes to the impropriator? or, For oxen fattened on ſuch hay only? 5. Quære.

TITHE muſt be paid for the milk of ſuch cows, the milk being of a different increaſe; but I do not well conceive what tithes can be paid for oxen only fattened with hay. Anſwer.

WHERE barren cattle are fed upon common ground, If the tithe is to be paid to the pariſh where ſuch common lies, or to the pariſh where the owner of the cattle lives? 6. Quære.

CATTLE feeding upon common ground or waſte whereof the pariſh is not certainly known, are by expreſs proviſion (2. Eliz. 16.) to pay tithes to the pariſh where the owner lives: but I think it is otherwiſe where the pariſh is *certainly known*. Anſwer.

IF any tithes are to be paid for cattle killed and eaten in the houſe? or, For the milk of cows eaten in the houſe? 7. Quære.

THIS circumſtance alone will not carry any exception. Anſwer.

How the tithe of milk is to be paid? Whether every tenth part of every time of milking, or every tenth meal or milking? and if obliged to give notice of every time 8. Quære.

of

of milking conſtantly every day, at ſuch a time or hour, is ſufficient? and if the tithe of the milk be not fetched away by the vicar, What is to be done with it?

Anſwer. IT has been adjudged, that of common right the tenth meal ought to be ſet out by the pariſhioners *at the common milking-place*; and though I think the law does not require notice of the ſetting out, yet as to *fetching it away* it is neceſſary, to render the vicar inexcuſable.

9. Quære. Where milk cows feed partly in one pariſh, If the tithe of the milk is to be paid in that pariſh only where they are milked, or otherwiſe?

Anſwer. I THINK the tithe of milk ought to be paid in each pariſh *for the time* the cattle are fed there.

10. Quære. WHEN the tenth of lambs, pigs, and calves is to be paid? If the pariſhioners had not ten lambs in the year, Are any tithes to be paid? and as the cuſtom of the pariſh is to ſuckle all their lambs till fat and ſaleable, If, in this caſe, the vicar can oblige the pariſhioners to pay tithe for the lambs when they are ſuckled and fit for market, or the tenth penny when ſold, or only as they fall and are able to live without their dam?

Anſwer. OF common right they are titheable when weanable, and they can live without the dam. If fewer than ten, the tenth part of the value at ſuch time is to be paid.

11. Quære. WHETHER any tithes are due for lambs that fall before Ladyday next, from which time the vicar had given notice to take his tithe in kind?

Anſwer. IF there be a running compoſition which hath included all ſorts of tithes, I apprehend that no tithes will be due for lambs that fall after Ladyday next, from which time the vicar hath given notice to take his tithe in kind.

12. Quære. WHERE ewes are brought from one pariſh to another ready to lamb; or ewes having juſt lambed, with their lambs,

lambs, If any tithes be due to the vicar for ſuch lambs not fallen in the pariſh, or for lambs fallen from ſuch ewes that have fed altogether in another pariſh?

No anſwer to this.

WHETHER deer or conies in a park which the occupier rents, and makes profit of the ſame deer and conies *by ſale*, pay any and what tithes? 13. Quære.

OF common right no tithes are due for deer or conies; and I do not know of any authority in law that alters the rule, *though* profit be made *of them* by ſale. Anſwer.

If underwood, *uſed only in fuel for the houſe*, and in fencing the ground, pay any tithe? or, Whether the ſame made into faggots, and ſold, pays to the vicar, and how? and, Whether the tithes of willows, haſles, birch, elder, thorn, &c. are vicarial tithes? 14. Quære.

UNDERWOOD ſo uſed is looked upon to be diſcharged from payment of tithes, either *per legem terræ*, or *by preſcription*; but made into faggots, and ſold, is titheable: but as wood is *eſteemed a great tithe*, I think, without uſage to the contrary, it is *payable to the impropriator, and not to the vicar*. Anſwer.

IF turnips are vicarial tithes, and if any tithes be due, where it is a ſecond crop of the ground that hath paid tithe before, or where they are eaten by profitable cattle? 15. Quære.

TURNIPS are eſteemed a ſmall tithe, and may as ſuch be payable to the vicar, if entitled thereto by *uſage or endowment*; and *by preſcription* the pariſhioner may be diſchargd from payment for a ſecond crop. Anſwer.

IF any of the above-mentioned tithes (of which there hath been no cuſtom or uſage for the payment thereof) be not ſet out or paid, Whether the vicar hath any remedy by 27. Hen. 8. c. 20. or by the late ſtatute for the better recovery of ſmall tithes? or any other, and what, remedy in this caſe? 16. Quære.

Anſwer. THE vicar's proper remedy would be by a bill in the court of exchequer.

CASE 12. The inhabitants of a particular hamlet lying remote from the pariſh church, having after continual payment of tithes for a great length of time, refuſed to pay the ſame, upon the pretence of their hamlet's being extra-parochial.—Mr. BOOTH's OPINION, Whether the accounts of the agents and tenants of the rectory adduced in the following Caſe are inconteſtible proof of the rights of tithe?

HIS Grace Edward duke of Norfolk is ſeiſed of the manor of Gloſſop in the county of Derby, and of the rectory and parſonage impropriate of Gloſſop and Gloſſop Dale, and of the advowſon of the vicarage of the church of Gloſſop and Gloſſop Dale, heretofore belonging to the late diſſolved monaſtery or abbey of Baſweeke, *alias* Bayſwarke, in Wales; which rectory of Gloſſop Dale, and advowſon of the vicarage of Gloſſop Dale, was granted to George earl of Shrewſbury, an anceſtor of his Grace, by letters patent dated 6th October, 29. Hen. 8.

THERE are in the pariſh of Gloſſop (beſides the townſhip of Gloſſop) ſeveral ſmall hamlets or villages, ſuch as Ludworth, Chiſworth, Chinley, &c. ſome adjacent to, and others (particularly Chinley) at a conſiderabe diſtance from, the townſhip of Gloſſop, and the pariſh church there; and the inhabitants of and owners or farmers of land in all theſe hamlets, and particularly the inhabitants of and owners or farmers of land in the hamlet of Chinley, have, till very lately, always paid their great or corn tithes to the duke and his anceſtors, and have likewiſe paid the Eaſter-dues and ſmall tithes to the vicar.

Oct. 15, 1745. THE duke of Norfolk, by indenture of this date, demiſed to John Moult of Chinley, in the manor of Gloſſop, in the county of Derby, gentleman, all thoſe the tithes of corn of him the ſaid duke yearly ariſing or happening within the tithing hamlet of Chinley in the manor of Gloſſop aforeſaid (except to the ſaid duke, his heirs and aſſigns, all the tithe within the eſtate of George Ward in the hamlet of Chinley aforeſaid, and alſo all ſuch *moduſes*, or other compoſitions for tithe hay or otherwiſe, as formerly had been, or then or thereafter ſhould be due and payable for the ſame out of the ſaid premiſes), to hold the tithes of corn aforeſaid (except as before excepted) to the ſaid John Moult, his executors, adminiſtrators, and aſſigns, from the 2d of February then laſt, for the term of twenty years, at the annual rent of 16l.

THE

THE great tithes of ſome of theſe hamlets have ſometimes been taken for the rector in kind, but have been moſtly from time to time let to perſons who farmed the ſame from the rector, at a certain yearly rent, as in the caſe of the leaſe taken by mr. Moult from the preſent duke of Norfolk; and ſuch perſons have either taken the tithes in kind of the owners or farmers of the lands, or elſe have come to an agreement with them for their paying certain yearly ſums in lieu thereof.

MR. MOULT, after taking the leaſe from his Grace, did from time to time make agreements with ſeveral of the owners or farmers of land in the hamlet or tithing of Chinley, for their paying him certain yearly ſums for their tithe corn, &c. in chinley, as ſet forth in the account thereof made out by him, and contained in the paper left herewith, marked (A).

AND the owners or farmers of land with whom mr. Moult made thoſe agreements, did yearly, from time to time, pay the ſums agreed to be paid by them, till the laſt year, when they all refuſed to pay the ſame, upon pretence that they are not within the pariſh of Gloſſop, and that their hamlet is extra-parochial; and they pretend to be exempted from the payment of all tithes, by virtue of ſome grant or charter prior to the grant made to the duke's anceſtor; and they alledge, that what they have from time to time paid, has been paid by them in their own wrong, as not being within the pariſh of Gloſſop, and therefore not ſubject to the payment of tithes to the rector of the ſaid pariſh: and upon theſe pretences they refuſe to pay any more tithes for their lands.

As to Chinley being in the pariſh of Gloſſop, we find, that by a conveyance, dated 24th June, 26. Cha. 2. made by one John Greene to one John Moult, that John Greene is deſcribed to be of Chinley-End in the pariſh of Gloſſop in the county of Derby; and John Moult is deſcribed to be of Chinley in the ſaid pariſh of Gloſſop and county of Derby; and the land conveyed by this deed is therein deſcribed to be ſituate in a place called the Maregreene, within the herbage of Mainſtonefield, *alias* Chimeleys, *alias* Chinleys, in the ſaid pariſh and county of Derby aforeſaid: and we do not doubt but to make it appear, by other old deeds of the like nature, that Chinley is mentioned to be in the ſaid pariſh of Gloſſop; and the common repute of the country is, that this hamlet of Chinley is in that pariſh.

In an old account, or copy of an account, of Robert Aſhton, for the rents, iſſues, and profits of the manor and rectory of Gloſſop for a year, ending the 30th September 1658, the ſum of 3 l. 7s. is ſet againſt Chinley, as the ſum which he charged himſelf with, and which, by the accounts which follow after, ſeem to be for the tithes of that hamlet: but this account, is not ſigned by any perſon.

In the account, or copy of the account, of John Wagſtaffe, for the rents, iſſues, and profits of the rectory and manor of Gloſſop for one year, ending 1ſt March 1672 (and marked at the bottom, "13th March 1672 *concord* "*et ex arte* John Halton"), the accountant charges himſelf with 20s. as received for the tithes of Chinley.

All which accounts, or copies of accounts, although not appearing to be originals ſigned, yet ſeem to bear the face of ſome antiquity.

In the rental or account of John Wagſtaffe of the manor and rectory of Gloſſop, with all the rents, iſſues, and profits, belonging to Jane dutcheſs-dowager of Norfolk, *anno dom.* 1690 (and which at the end thereof is marked—"16th May 1692, this account was ſeen and "allowed by me, J. Norfolk;"—and which, as to the name, is of her own hand-writing), the accountant charges himſelf under the title "Tithe Corn Rents, 1690, "Yearly Rent," thus: "Chinley, George Ward, 21l. 10s."

And in the rental or account of the ſaid John Wagſtaffe of the manor and rectory of Gloſſop, with all the rents, iſſues, and profits, belonging to Jane dutcheſs-dowager of Norfolk, *anno dom.* 1691 (and which, at the end thereof, is marked---"1ſt Auguſt 1693, this account was "ſeen and allowed by me, Jane Norfolk;"---and which as to the name, is of her own hand-writing), the accountant charges himſelf under the title, "Tithe Corn Rents 1691, "Yearly Rent," thus: "Chinley, George Ward, 21l 10s."

As we believe it can be made appear, that the owners, or farmers of land in the manor of Chinley have always, within the memory of the oldeſt man now living, paid their great or corn tithes to the duke of Norfolk and his anceſtors, and that they and the inhabitants within the ſaid hamlet have likewiſe paid the Eaſter-dues and ſmall tithes to the vicar of the ſaid pariſh of Gloſſop, and that we have ſuch evidence as before is ſtated of the hamlet of Chinley being within the ſaid pariſh:

Quære. Whether the owners or farmers of lands in the ſaid hamlet of Chinley are not obliged to pay their great or corn

corn tithes to the duke of Norfolk or his leſſee? and, What will be the beſt method to compel them to pay the ſame? and, Whether by action or ſuit in the duke's name, or in that of the ſaid John Moult, his leſſee?

I AM of opinion, that the occupiers of land in the hamlet of Chinley here mentioned are obliged to ſet out or to account for their great tithes to his Grace the duke of Norfolk, or his leſſees. I have known old rentals and ſtewards accounts, found in evidence-rooms, or among old papers, much more obſcure than theſe papers here ſtated, allowed in evidence upon caſes of quit-rents, and other ſuch uſes, by the late lord chancellor the earl of Hardwicke; and as the duke of Norfolk is here ſtated to be entitled to the rectory, and is as ſuch lay impropriator, I think his Grace is clearly entitled to have theſe tithes ſet out, either to him or his leſſee. Anſwer.

THE beſt way is to file a bill in the exchequer againſt the principal farmers in the name of the duke's leſſee, mr. John Moult. I will give mr. Wilmot the form of a proper bill. As mr. Moult's term will expire in five or ſix years, his Grace may be alſo made a co-plaintiff with him.

Lincoln's Inn, JA. BOOTH.
31ſt July, 1759.

CASE 12.

The tenants of the manor of *T.* having through the inattention of the proprietors of, and the fluctuation of the title to that manor, paid their great tithes to the proprietor of the rectory of *E.* for about fifty years—The OPINION of Mr. BOOTH, Whether this ſucceſſion of payment would operate in bar again a grant made by queen Elizabeth of theſe tithes?

10 January, 42. Eliz. THE queen by her letters patent, bearing date at Weſtminſter this day in conſideration of 214*l.* 16*s.* paid into her exchequer by George Auſteene and William Minterne, did give and grant unto the ſaid George Auſteene and William Minterne all that the manor or farm of Trotteſworth, in the county of Surrey, with all and ſingular

gular the rights, members, and appurtenances thereunto belonging, in the tenure or occupation of James Bende, or his aſſigns; and all houſes, edifices, lands, tenements, meadows, paſtures, leaſowes, commons, feedings, ſituate in the pariſhes, villages, or fields, of Egham and Thorpe, or in any of them, in the ſaid county of Surrey, to the ſaid manor or farm of Trotteſworth, in any manner belonging or appertaining; and all perquiſites and profits of courts to the ſame manor of Trotteſworth, parcel of the poſſeſſion of the late monaſtery of Abendown, in the county of Berks; and alſo all and ſingular the meſſuages, mills, houſes, edifices, buildings, barns, ſtables, dove-houſes, yards, orchards, gardens, ſhops, cellars, &c. *tithes of corn, grain, and hay, wool, flax, hemp, and other tithes* whatſoever, as well great as ſmall, oblations, obventions, fruits and profits, waters, fiſheries, &c.

This manor has had a great many owners ſince the above grant, and there have been as many ſeveral conveyances of it, wherein the tithes have been particularly mentioned in every ſuch conveyance down to the laſt deed. It was in the poſſeſſion of the family of the Machel's in Lancaſhire, a great many years. Thomas Forſter, eſq. is the owner of the manor now, and can deduce a regular title from the grant; but as it is very voluminous, his ſolicitor did not think there was occaſion, upon the preſent queſtion, to be ſo particular.

Eaſter Term, 4. Car. A recovery was ſuffered of the manor of Trotteſworth, *and the tithes* are particularly named to paſs therein; and by the deed, dated 29th April 1629, to lead the uſes of the ſaid recovery, it is declared to be to the uſe of J. Machel the younger of Wendover, eſq.

13th July. 1689. The ſaid J. Machel made his will, executed in the preſence of three witneſſes, and gave to his ſon J. Machel all his real eſtate in fee, and appointed him executor thereof.

3d Auguſt 1728. J. Machel, clerk, after the deviſe of his eſtate in London, gives all the reſt of his meſſuages, lands, tenements, and real eſtate, whatſoever, in which Trotteſworth muſt be included, to his wife for life; remainder to T. Machel the elder, of Wendover, in tail; remainder to L. Machel, of Weſtmoreland, in fee.

30th October and 1ſt November 1750. By indentures of leaſe and releaſe between the ſaid L. Machel, eſq. and Deborah

Deborah his wife, of the one part, and Charles Simes and Samuel Meredith of the other part, the paid L. Machel, in consideration of 3160l. paid to him by the said Charles Simes, did grant and release unto the said Charles Simes and Samuel Meredith, and their heirs, all that the manor or reputed manor of Trottesworth, &c. (the names of the fields are particularly mentioned, and the quantity of acres); all which said manor, messuages, lands tenements closes, inclosures, wood-grounds, and waste and common, were late the inheritance of J. Machel, *alias* Columna J. Machel, clerk, deceased, who was only son and heir of J. Machel, junior, esq. deceased, and by the said J Machel, clerk, were devised to his wife for life (who is since dead), with remainder to J. Machel, late of Wendover, in tail male, who died without issue, remainder to L. Machel in fee, as before-mentioned, to hold to the said Charles Simes and Samuel Meredith, their heirs and assigns; but as to the estate of the said Samuel Meredith, in trust for the said Charles Simes, his heirs and assigns, forever. Covenant to levy a fine; and executed by all the parties.

Easter, 24. Geo. 2. INDENTURES of a fine between Charles Simes and Samuel Meredith plaintiffs, and L. Machel, esq. and Deborah his wife, deforceants, of two messuages, fourteen gardens, two hundred acres of land, seventy acres of meadow, one hundred and forty acres of pasture, forty acres of wood, and two hundred acres of furze and heath, with the appurtenances, in the parish of Egham and Thorpe, and of all manner of *tithes* whatsoever yearly coming, growing, or renewing, from and out of the said premises.

IN the year 1752 the said Charles Simes become a bankrupt; and in the year 1758 the manor and farm of Trottesworth, and all and every the manors, messuages, lands, tenements, and premises, &c. late of L. Machel, which were devised to him by the will of J. Machel, &c. were sold by the assignees, of Simes, and legally conveyed to T. Forster, esq. the purchaser.

THIS manor having been in the hands of persons who lived remote from the place, and being frequently in mortgage, or in the hands of assignees under commissions of bankruptcy, it has had the misfortune, till very lately, to be in a continued state of disquiet; the title-deeds have not been attended to; the tenants of the manor, notwithstanding the grant and other conveyances, have paid tithes to the owner of the rectory of Egham)in which parish the

manor

manor of Trotteſworth lies) for about forty or fifty years. The tenants uſed ſometimes to repine at paying the tithes; but the owners of the rectory being gentlemen of large fortune, they were afraid of offending them, and ſo paid the tithes rather than contend the matter.

Mr. Forster, upon his diſcovering that the tithes were purchaſed with the manor, ſhut his gates this year againſt the farmer of the tithes, to prevent his taking his tithe hay off the premiſes; and mr. Forſter having privilege of parliament, they did not chuſe to enter forcibly.

Quære. As the tenants of the manor of Trotteſworth for the ſpace of about fifty years have paid tithe to the rectory of Egham, Will that cuſtom deſtroy the grant of queen Elizabeth, and give a right to the owner of the rectory of Egham?

Anſwer. I HAVE conſidered this Caſe, and I doubt whether things have been ſufficiently ſcrutinized into to be ripe for a clear opinion. In queen Elizabeth's grant, ſtated above to be dated 10. *Januar. anno reg.* 42. there are clear words importing a grant of all tithes of corn, grain, and hay, and wool, flax, hemp, &c.; and I do not doubt but ſhe had them in her power to grant; but you muſt be able to prove that ſhe had title thereto.

Now it is poſſible that the rectory of Egham (in which pariſh you ſay theſe lands lie) was appropriated to ſome Religious Houſe, and by the diſſolution of monaſteries came to the crown, perhaps with the manor.

If the crown granted away the rectory, reſerving the tithes of this manor, or of the lands parcel of this manor, it will be well; and therefore you will have nothing in the Caſe that will make againſt you but the length of time that the lay rector has been ſuffered to enjoy, or rather to take, thoſe tithes; from whence a preſumption will be endeavoured to be made to ariſe, that ſome former owner has regranted the tithes to the rectory, or that they are ſome other way re-united to the rectory. As to this Caſe being within the ſtatute of limitations, I incline to think that, ſtrictly ſpeaking, it is not.

I TAKE

I TAKE it to be law, that if a lay rector (much more if an eccleſiaſtical one) omits to gather his tithes for twenty years, and then brings an action of debt for ſubſtractions of tithes on the ſtatute of Edw. 6, or files his bill in equite for an account, that there the ſtatute of limitations cannot be pleaded in bar of either of the ſuits; neither can it be ſaid, that he hath been diſſeiſed of his tithes; for though the tithes have been withheld from the rectory, yet he has not been ſo put out of poſſeſſion, as that he has been ouſted with expluſion of that poſſeſſion; and that ſuch poſſeſſion has been held from him by the owner of the lands as it were by ſtrong hand, and with ſuch uninterrupted continuance as a diſſeiſor is ſuppoſed to hold with when he enters another's freehold and holds it againſt the diſſeiſee, *nolens volens*, for twenty or thirty years.

IT is a rule upon theſe ſtatutes, that no title or intereſt is barred but what is turned to a right and actually diveſted; but where there is any thing like an actual ouſter, there the eſtate is diveſted and turned to a right. It is for this reaſon that it hath been held, that where a diſſeiſor enters into land *aperto manu* claiming the freehold, and continues above twenty years in poſſeſſion, and then, ſome time afterwards, the diſſeiſee enters again upon him, that is a ſufficient title to recover upon in ejectment, as that gives the right of poſſeſſion though not the right of action. But the preſent is a very different caſe; for here appears to have been no ouſter. If you can ſhew that the rectory or the tithes was in leaſe at the time of queen Elizabeth's grant; that is, that they had been leaſed by the monaſtic body, or by the king, after the diſſolution, for ſome long term, that had continuance long after queen Elizabeth's grant; you would go a great way towards accounting for the occupier's acquieſcence in paying of tithes; for then the words, "all tithes of grain, corn, hay, &c" in queen Elizabeth's grant, would mean the reverſion

(after

(after the expiration of the term) of all tithes of corn, grain, &c.; and then the caſe would be no more than this: The abbot or the crown makes a leaſe of the rectory, or of the tithes, to *A.* for ſixty, eighty, or one hundred years; then the queen grants the manor of theſe lands, and all tithes of corn, hay, &c. to Auſteene and Minterne in fee; and then king James I. grants the rectory and tithes to *J. S.* in fee; and thereupon *J. S.* purchaſes in the leaſe, and takes an aſſignment thereof in the name of a truſtee: there the owners of the rectory would be entitled to the tithes of this manor of Trotteſworth as long as the leaſe had continuance; and from thenceforth thoſe deriving under the grantees of the manor would be entitled to retain them.

If you cannot account for the rectory's having the tithes this way, they will argue ſtrongly, that the length of time forms a preſumption that there hath been a re-grant, and alſo a re-union; though ſome ſcrupulous land occupiers take it to be againſt conſcience not to pay tithes to their rectors. If you could ſhew any time when the payment of them was ſo much as conteſted, it might have its uſe; but it muſt be left to a jury.

Lincoln's Inn,
Auguſt 17, 1763.

JA. BOOTH.

TITLE

TITLE.

CASE I.

Mr. BOOTH's OPINION, In whom the legal title to an eſtate directed to be ſold by a decree of the court of exchequer was veſted.

I HAVE peruſed this abſtract. I poſtpone the conſideration of the matters that relate to the title of the ſeveral purchaſes made by the Benſons (moſt of which ſeem to have been pretty regularly tranſacted), in order to examine into that which is the moſt material point, touching the force and efficacy of thoſe conveyances which any body, bound by the decree of the court of exchequer of the 8th December 1759, and now amenable by the proceſs of the court, is able to make to the intended purchaſer. The general title is governed by the wills of John Benſon ſenior, dated 24th January 1716; of John Benſon junior, dated 29th June 1739; and of Peter Benſon, 2d May 1743. The will of this laſt extends to the greater part of the eſtate; and therefore I will conſider it the firſt.

I HAVE called for and inſpected an exact copy of this will. In the beginning of it the teſtator gives various legacies. Then he ſays expreſsly, "I do hereby charge "all my meſſuages, lands, &c. and all other my real and "perſonal eſtate, with the payment of the aforeſaid "legacies and ſums of money which I have by this my "will given to be paid." Then he gives ſuch lands as he then ſtood ſeized of, and which had been purchaſed by him ſince the death of his father, unto his brother Thomas Benſon, his heirs and aſſigns, ſubject to the payment of the aforeſaid legacies and ſums of money; and as to ſuch lands, tenements, and hereditaments as came to him by deſcent, deviſe, or otherwiſe, from his ſaid late father John Benſon deceaſed, he gives the ſame to John Buckland and Narciſſus Hatherley the younger, and

and their heirs for ever, to and upon the ſeveral uſes following, *viz.* to the uſe of the ſaid Thomas Benſon his brother for ninety-nine years, if he ſo long live; the remainder thereof to the uſe of the aforeſaid John Buckland and Narciſſus Hatherley, their heirs and aſſigns, during the natural life of the ſaid Thomas Benſon, the better to ſupport the contingencies after limited; the remainder, after the death of the ſaid Thomas Benſon, to the uſe of his brother John Benſon, ſon of the ſaid Thomas, for ninety-nine years, if he ſo long live; the remainder thereof to the uſe of the ſaid John Buckland and Narciſſus Hatherley, their heirs and aſſigns, during the life of the ſaid nephew John Benſon, the better to ſupport the contingencies after limited; the remainder, after the death of the ſaid John Benſon, his nephew, to the uſe of his firſt and other ſons in tail male ſucceſſively; and for want of ſuch iſſue, to his nephew Peter Benſon, another ſon of the ſaid Thomas Benſon, for ninety-nine years, if he ſo long live; the remainder thereof to the uſe of the ſaid Buckland and Hatherley, their heirs and aſſigns, during the life of the ſaid Peter Benſon his nephew, the better to ſupport the contingencies; the remainder, after the death of the ſaid Peter Benſon his nephew, to the uſe of his firſt and other ſon and ſons ſucceſſively in tail male; and for want of ſuch iſſue, to the uſe of the third, fourth, fifth, and every other ſon and ſons of the ſaid Thomas Benſon lawfully to be begotten in like manner as aforeſaid; with remainder alſo in tail male, one after the other, according to ſeniority of age, the elder of ſuch ſons, and the heirs male of his body, to be preferred to the younger, and the heirs male of his body; and for want of ſuch iſſue, to the uſe of John Stafford, Son of Robert Stafford, for ninety-nine years, if he ſo long live; with remainder to the aforeſaid truſtees for his life, to preſerve the contingent remainders; with remainder to his

iſſue

iſſue male in ſtrict ſettlement; with many remainders over of the like nature.

Now, whenever legacies or ſums of money are, by will, charged on lands, there courts of equity may, and always do, direct a ſale; but decrees do not bind the land; they only bind the perſon: and where the perſon againſt whom the decree is pronounced will not obey it, the court will commit him, or, for the contempt, will order ſequeſtration; but as *æquitas agit in perſonam non in rem*, the eſtate in the land cannot be altered by the decree, but muſt be conveyed or transferred by the party, ſo far as he has any intereſt therein, by ſome formal deed or conveyance proper to that end. And where the fee is in abeyance, or in contingency, and the perſons for whom it was intended are not *in eſſe*, infants or infanes, or abſent out of the realm, or not before the court, and ſo not bound by the decree, there regularly there can be no conveyance had. And though the court directs, that ſuch and ſuch lands ſhall be ſold, yet if it ſo happens that there are no truſtees appointed to make the ſale, and if the legal eſtate is thus fettered and entailed that nobody is *in eſſe*, or can be met with, that can transfer that legal eſtate to the intended purchaſer, there the ſale can never take place effectually, for want of proper conveyances; and the only way left is, to ſet afoot ſome expedient for the having the aid of the legiſlature under the ſanction of an act of parliament. But courts of equity have only judicial, not legiſlative, authority.

Now, as to ſuch of the teſtator Peter Benſon's lands as he had purchaſed ſince the death of his father, the teſtator gives them to Thomas Benſon his brother in fee. This Thomas Benſon is abſent out of the realm, and is not anſwerable by the proceſs of the court. If you can get him to execute proper conveyances,

ances, whereby to fetch the fee out of him, and he will do this of his own accord, it will be very well; but you cannot compel him to it; and till he does it, the fee will be outſtanding.

THEN, as to ſuch of the teſtator's lands as came to him by deſcent, deviſe, &c. from his father, they are given to Buckland and Hatherley, and their heirs, to particular uſes. The legal eſtate will follow the uſes. Buckland and Hatherley are but pipes, and take no eſtate. Then the firſt eſtate in the uſe is in Thomas Benſon the abſentee for ninety-nine years, if he ſo long lives. This eſtate muſt be fetched out of him by ſome actual conveyance, which I ſuppoſe you cannot have, no more than the fee in the other parcel; and till it is transferred by ſome conveyance it will be outſtanding. The eſtate of freehold is in the truſtees. You may have a conveyance of this eſtate under the decree, becauſe Narciſſus Hatherley, the ſurviving truſtee, is a party to the ſuit, and bound by the decree; but this eſtate is to endure only during the life of Thomas Benſon. The remainder for ninety-nine years in John Benſon the ſon, if he ſo long lives, you may have, if he is of age, he being a party; and ſo of the remainder for his life in the ſurviving truſtee Hatherley. But then, as to the inheritance in tail, which is ſettled in remainder on John's firſt ſon, I do not find there is any ſuch ſon *in eſſe*, or if he is, he does not appear to be a party to the ſuit; neither is it known to me, whether, if any ſuch ſon there be, that ſon is not now an infant, which is moſt probable. In either of theſe caſes you will fail of a proper conveyance; and till that is had, the fee will be outſtanding. It is material to enquire into the truth of this fact about there being any ſon of John's *in eſſe*, and whether he is

of

of age, for the reaſons in the margin. But as he probably is either not *in eſſe*, or under age, there will be a full ſtop to every chance of being able to have a proper conveyance till he is of age; and I might go through all the eſtates of all the remainder-men in like manner, to ſhew they muſt actually be conveyed.

If there is a firſt ſon of John *in eſſe*, and he is of age, and a party to the ſuit, and bound by the decree, you may oblige Hatherley, the ſurviving truſtee of the freehold, and ſuch firſt ſon, to join in proper acts to ſuffer a recovery, which will bar all the ſubſequent remainders in this part of the eſtate; but the term of ninety-nine years in Thomas Benſon, which governs the ejectment, will be left in him, and cannot be affected by ſuch recovery.

I OWN the charge by the teſtator of theſe legacies on his lands creates a lien, and a court of equity may appoint a receiver, and order the rents and profits to be applied to keep down the intereſt of the legacies; but a court of equity cannot create an eſtate; nor can it, of its own authority, transfer any eſtate or intereſt out of the perſon in whom it is inveſted by law, otherwiſe than by ordering that perſon, if a party to the ſuit and before the court, to execute proper deeds, whereby legally to transfer ſuch eſtate; and if he diſobeys, they may puniſh him for his diſobedience. But his compliance only can make a purchaſer ſafe, and give him a legal title to the eſtate.

I POSTPONE all other conſiderations till I am informed how far it is practicable to get a conveyance, or a conſent to an act of parliament, from Thomas Benſon; and whether any ſon of John Benſon is of age, &c.

Lincoln's Inn, JAS. BOOTH.
July 16, 1762.

CASE 4.
The OPINION of Mr. BOOTH upon the importance of a deed loſt or miſlaid to deducing the title to an eſtate agreed to be ſold.—Alſo, his advice upon the mode of contracting to be purſued by the purchaſer, where a decree for ſale, made in a cauſe inſtituted ſome years previouſly to the contract, had never been obeyed.

THOUGH the deed of the 23d of May 1704 is either loſt or miſlaid, yet the evidence thereof from the fine levied in the Eaſter Term after the aforeſaid 23d May 1704, and from the articles of the 15th January 1716, and eſpecially from the recital in the ſaid deed of the 15th April 1732, is ſo ſtrong, that I think it would be a ſufficient

ſufficient foundation to recover to in ejectment againſt any one claiming title under Iſabella, the wife of mr. Thomas Stonor the father, or either of them, or their heirs; and though in inſpecting a title in behalf of a purchaſer it is neceſſary to be more exact, becauſe a purchaſer pays a price for an indiſputable title, yet where caſes of this kind happen, that material deeds are miſlaid, I do not think a title is to be rejected on that account. But the better way ſeems to be, to inform the purchaſer, that the title may be ſufficient to ſupport itſelf, if he is ſatisfied he is dealing with perſons of worth and credit, and ſuch as are not likely to miſrepreſent the ſtate of the title, or deceive him in it; but whenever the purchaſer has reaſon to ſuſpect that there is any unfair dealing, he is to be upon his guard when he is told that any particular are material deed is not forthcoming, becauſe the ſuppreſſion thereof may be by deſign, and to conceal the real contents thereof from his knowledge. If therefore mr. Andrews, the intended purchaſer here, is ſatisfied as to the integrity of the vendors, and the fairneſs of the agents, I ſhould not think this title a bad one, purely on account of the loſs of the deed of the 23d May 1704. But there is another matter of more conſequence that muſt be attended to.

In the ſtate of the deeds and evidences relating to theſe five houſes on this abſtract, there is mention made of a decree in chancery in 1742 againſt mr. Loggin, for the ſale of the premiſes, before a maſter, to the beſt purchaſer. I do not find any proceeding has been carried on before the maſter upon the foot of this decree. But I apprehend it is abſolutely neceſſary to proceed thereon, and that no purchaſer will be ſafe in taking a conveyance from the heir of mr. Loggin, the executors of mr. Stonor the father, and the preſent mr. Stonor, without its appearing that he is the beſt purchaſer that did appear before the maſter; and that the eſtate was fairly ſold before that court, for the beſt price that could be had for the ſame. Mr.

Stonor's

Stonor's infant ſon has for this purpoſe been made to file his bill againſt all the aforeſaid parties; and as, under the truſts of the deed of the 15th April 1732, he has a right to have theſe premiſſes ſold for their moſt extended value, and to have the money to ariſe by that ſale applied to pay off the incumbrances affecting the eſtate ſettled on him on his father's marriage; and as the court has made a decree for that purpoſe, and by that decree has marked out a method for the ſale of the premiſſes in the faireſt manner and to the beſt advantage; I find myſelf obliged to tell the intended purchaſer he is not ſafe in the preſent method of proceeding, but that the true courſe is to go back to the court, and to bid for the eſtate before the maſter; and if he happens to offer more than any body elſe, and gets himſelf reported the beſt purchaſer, and thereupon takes a conveyance in the uſual form from the ſeveral perſons before-mentioned, then, I conceive, he will have a good title; but his deeds muſt be regiſtered and inrolled in ſome of the courts at Weſtminſter.

Lincoln's-Inn, JA. BOOTH.
July 2, 1750.

If the intended ſale goes on, mr. Andrews muſt ſearch the Regiſter's Office for Middleſex for incumbrances on theſe houſes, or rely on what information he can have in relation thereto from the vendors; but that will be at his peril.

CASE 3.
1717, Feb. 10. and 11.
A perſon had contracted for the purchaſe of ſome houſes; but being informed that the vendor had not a ſufficient title, filed his bill to be diſcharged from the agreement; and the Maſter having reported the ſeveral objections to the title—Mr. WARD's and Mr. PRICE's OPINIONS upon the aſſurances requiſite to be made and produced in order to perfect it.

BY indenture of leaſe and releaſe between Thomas Pinder, eldeſt ſon and heir of Robert Pinder, late of Clitherow, *in com. Lanc.* of the one part, and Thomas

Stanley, eſq. of the other part, the ſaid Thomas Pinder, for the conſideration of 48l. did grant, &c. unto the ſaid Thomas Stanley in fee, all that meſſuage or burgage oppoſite to Moothall in Clitherow aforeſaid, with a garden and croft, containing one rood, in the poſſeſſion of the ſaid Thomas Pinder.

1719, March 1 and 2. By indenture of leaſe and releaſe between William Stringer, eſq. of the one part, and Thomas Stanley, eſq. of the other part, the ſaid William Stringer, for the conſideration of 42l. did grant, &c. unto the ſaid Thomas Stanley in fee, all that meſſuage and tenement in the Lower Gate in Clitherow, in the poſſeſſion of Thomas Herd and Ellen Walker, with a garden and ſtable to the ſame.

1. July, 2 Ann. MARY PARKER, by will, gives (*int. al.*) to her daughter Catherine Parker, (now wife of Thomas Stanley, eſq.) 2000l. to be paid at her day of marriage, or age of twenty-one, and until the ſame be paid, gives her 60l. a-year for her maintenance; for payment whereof ſhe binds her whole eſtate. Deviſes to her ſon Chriſtopher Parker in fee, all her manors, meſſuages, lands, tenements, hereditaments, and premiſſes, whatſoever and whereſoever, from and immediately after he attains his age of twenty-one; in the interim, the rents and profits to be received by her executor, for the education of her ſaid ſon: if either of her ſaid children die before they attain the age of twenty-one, or the ſaid Catherine be married, or the ſaid Chriſtopher hath children, that then the ſurvivor ſhall be heir to the deceaſed. If they die without children, then ſhe deviſes all her meſſuages, lands, and tenements, which ſhe was poſſeſſed of before ſhe married to Anthony Parker her huſband, and alſo thoſe ſhe had ſince purchaſed, to her brother William Stringer, eſq. eldeſt ſon of her father ſir Thomas Stringer, and unto her other brother colonel Thomas Stringer, and to their heirs, equally to be had and enjoyed by them; and makes Thomas Stringer executor: and doth deviſe to the ſaid Thomas Stringer, and his heirs, all thoſe meſſuages, lands, tenements, and hereditaments, whatſoever and whereſoever, which ſhe had purchaſed of John Robinſon deceaſed, or Edmund Robinſon his father, in truſt to ſell the ſame to raiſe money for the payment of her debts.

1. July, 2. Ann. MARY PARKER died.

COLONEL THOMAS died inteſtate.

1714, June 8. By indenture between William Stringer of the one part, and Thomas Stanley and Catherine his wife of the other part,

part, Reciting, that the name of the ſaid William Stringer, together with Thomas Stringer, Chriſtopher Parker, and Anthony Parker (all ſince deceaſed,) were uſed, in truſt to ſee the ſum of 1300l. laid out in the purchaſe of lands to be ſettled on the ſaid Anthony Parker and Mary his wife, and the heirs of their bodies; and alſo, that by indenture ſaid Mary Parker, executrix of the ſaid Anthony Parker, for the conſideration of 1300l. did bargain and ſell, &c. unto the ſaid William Stringer and Thomas Stringer (*int. al.*) all that meſſuage and tenement, with the appurtenances, then lately purchaſed of Robert Pinder for 320l. all that meſſuage or tenement then lately purchaſed of Henry Bailey for 255l. all that meſſuage or tenement then lately purchaſed of William Patefield for 80l. a meſſuage or tenement purchaſed of Chriſtopher Chippindale for 50l. a meſſuage or tenement purchaſed of Leonard Nowell for 40l. a meſſuage or tenement purchaſed of Ellen Howſon for 50l. all which were purchaſed by the ſaid Mary Parker after the deceaſe of the ſaid Anthony Parker, and are ſituate in Clitherow, *in com. Lanc.* to hold to the ſaid William Stringer and Thomas Stringer in fee, upon truſt to be indemnified for payment of 1300l. to the ſaid Mary Parker; and if ſhe ſhould diſpoſe of the ſaid 1300l. or any part thereof, contrary to the ſaid truſt, that then the ſaid William Stringer and Thomas Stringer ſhould and might, by ſale of the ſaid premiſſes, raiſe 1300l. or ſo much thereof as ſaid Mary Parker ſhould have diſpoſed of, to make up and ſatisfy the truſt aforeſaid: Reciting the above-recited will of the ſaid Mary Parker, that ſhe thereby gave her brother Thomas Stringer, and his heirs for ever, all thoſe meſſuages, lands, tenements, and hereditaments, which ſhe had purchaſed of John Robinſon and Edmund Robinſon, in truſt to ſell the ſame for the payment of her debts; and alſo reciting, that by indenture, in conſideration of a marriage then intended between the ſaid Anthony Parker and the ſaid Mary Parker (then Mary Stringer), and in conſideration of 1500l. as her marriage portion paid by ſir Thomas Stringer, he the ſaid Anthony Parker did bargain and ſell, &c. unto the ſaid ſir Thomas Stringer, William Stringer, Thomas Parker, and Thomas Butler, all that park of Radam in *com. Ebor.* to hold to them for the reſidue of a term of ninety-nine years, if the ſaid Anthony Parker, John Parker, and Alexander Parker, ſons of the ſaid Chriſtopher Parker, ſhould ſo long live, in truſt to permit the ſaid Chriſtopher

24. July 1696.

Chriſtopher Parker to receive the rents for his life; remainder to the truſtees for the raiſing of 500l. to be paid as the ſaid Chriſtopher Parker ſhould appoint; which was raiſed and paid according to ſuch direction: Reciting, that the ſaid ſir Thomas Stringer, Thomas Parker, Thomas Butler, and Thomas Stringer, are dead; and that the whole truſts in the ſaid deeds and will; and the premiſes therein, are veſted in the ſaid William Stringer by ſurvivorſhip: and alſo Reciting, that the ſaid Mary Parker did in her life-time purchaſe ſeveral meſſuages, lands, and tenements, in Clitherow, of greater value than 1300l. and ſettled the ſame upon her ſon and daughter, the only iſſue of the ſaid Anthony and the ſaid Mary: and, laſtly, Reciting, that part of the debts of the ſaid Mary Parker are paid, and the ſaid Thomas Stanley hath taken upon himſelf to diſcharge the remaining: It is witneſſed, that the ſaid William Stringer, to execute the eſtate in law to the heirs of the ſaid Anthony as was intended, after the execution of the ſaid truſt, did grant, bargain, &c. unto the ſaid Thomas Stanley and Catherine his wife, their heirs, executors, adminiſtrators, and aſſigns, all thoſe ſaid ſeveral meſſuages, lands, and tenements, purchaſed of Robert Pinder for 320l. of Henry Bailey for 255l. of William Patefield for 80l. of Chriſtopher Chippindale for 50l. of Leonard Nowel for 40l. of Ellen Howſon for 50l. all which are ſituate in Clitherow, and of John Robinſon and Edmund Robinſon, and Radam Park, to hold unto the ſaid Thomas Stanley and Catherine his wife, their heirs, executors, adminiſtrators, and aſſigns, to the uſe of them, their heirs, executors, adminiſtrators, and aſſigns, for ever, ſubject to ſuch truſts as remain unperformed.

Int. { *Ed. Harvey, Joſephum Ayloffe, et Sh. Bridges, arm. et Ed. Dixon,* QUER. BY *Thomam Stanley et Catherina ux. Alexander Parker, Margaret. Parker vid et Wm. Browne,* DEFTES.

1 May. K. G. On reading the ſaid will of Mary Parker, dated 1ſt July, 2 Q. Anne, and the deed of the 8th of June 1714, and the firſt queſtion being, Whether the lands and premiſes in Clitherow, part whereof were mortgaged by Chriſtopher their ſon to plaintiff Harvey, other part ſettled in jointure on Margaret Parker, were liable to thoſe incumbrances, or not? to this his lordſhip declared, that thoſe

thoſe lands having been purchaſed by ſaid Mary Parker the mother, and the ſame *(inter alia)* by her will being deviſed to Chriſtopher the ſon, upon contingency of his having iſſue; and he dying without iſſue, and having levied no fine, or ſuffered any recovery thereof, that therefore all ſuch lands as were purchaſed by ſaid Mary Parker, and by her ſaid will (which is declared to be well proved) go over and belong to defendant Catherine Stanley, the daughter and ſurviving iſſue of ſaid Mary Parker, and are not liable to any debts or incumbrances of Chriſtopher the ſon, but ought to be held and enjoyed by defendant Thomas Stanley and Catherine his wife, and their heirs, freed and diſcharged as well of plaintiff's demands as of any other incumbrances done or committed by ſaid Chriſtopher Parker the ſon; and did order and decree the ſame accordingly. *Vide* Decree ſigned and inrolled.

THE ſeveral deeds, will, and decree, in this abſtract mentioned, are ready to be produced and ſhewn to plaintiffs' counſel; and defendant Stanley and Catherine his wife are willing and ready to execute any other or further aſſurance of the premiſes already purchaſed by the plaintiff, for the more perfect and better conveying the ſame to plaintiff and his heirs.

EDWARD STANLEY,
Solicitor *pro* Defendant.

THE plaintiff purchaſed theſe houſes without having the title inſpected, and has paid the money; is ſince adviſed that the defendant has not a good title, and therefore has brought a bill to be relieved.

IF this is a good title, and ſuch a one as a court of equity will oblige a purchaſer to accept of? Quære.

I AM of opinion, that the purchaſes of Pinder and Stringer being of ſo late a date, ſatisfaction ought to be given to the purchaſer how they became entitled, by deſcent or purchaſe; but the other houſes being purchaſed before 1696, and by decree this being declared to belong to Thomas Stanley and Catherine, if they are under no ſettlement, I think, if Catherine and her huſband join in a fine, that this will be ſuch a title as, conſidering the circumſtances Anſwer.

cumſtances of this Caſe, a court of equity will oblige a purchaſer to accept; but the deeds recited in the deed of the 8th of June 1714 muſt be produced.

26th May, 1725. NATH. PIGOT.

Between { JAMES HALDANE, Eſq. Plaintiff; AND THOMAS STANLEY, Eſq. Defendant.

To the Right Honourable SIR THOMAS PENGELLY, Knight, Lord Chief Baron *of His* MAJESTY's Court of Exchequer *at* Weſtminſter, *and the reſt of the* Barons *there.*

Further CASE and OPINION.

IN purſuance of and in obedience to an order of this honourable court, made the 19th day of February 1725, I have been attended by the clerks in court, and ſolicitors on both ſides, and do find, that on the 5th day of July 1726 the plaintiff's ſolicitor brought before me two deeds of leaſe and releaſe, mentioned in the complainant's bill, and which, by an affidavit annexed to the ſaid bill, are all the deeds or writings in the cuſtody or power of the complainant; which deeds bear date the 27th and 28th days of February 1721, and are made between the now defendant Stanley only on the firſt part, and the now complainant on the other part purporting to be indentures of leaſe and releaſe, whereby the five burgage-houſes in queſtion are conveyed or mentioned to be conveyed, by the defendant to the complainant and his heirs: and in ſaid indenture of releaſe the now defendant covenanted (*inter alia*), that at the time of the execution thereof the now defendant had an abſolute eſtate in fee of the premiſſes: and therein is alſo contained a covenant from the defendant to the plaintiff for further aſſurance. And I do alſo further find, that on the ſame day the defendant's ſolicitor brought before me an abſtract of ſeveral deeds and writings, being the title-deeds relating to the premiſes in queſtion; and thereby I find, that after the deed of leaſe and releaſe made by the defendant Stanley to the ſaid complainant Haldane

Haldane were executed as above-mentioned, a fine of five burgage houſes was levied by the defendant Stanley and his wife to the complainant Haldane, whereby the legal eſtate paſſed to the complainant Haldane of the ſaid five burgages: but it does not appear that the ſaid defendant Stanley's wife has joined in any declaration of the uſes of this fine, or what uſes were declared thereof. I do find that one of the ſaid burgages was ſold to the defendant Stanley by Thomas Pinder on the 11th of February 1717; and that one other of the ſaid burgages was ſold to the defendant Stanley by William Stringer of Gray's Inn in the county of Middleſex, eſq. by deed dated the 2d of March 1715; and that no other title deeds but thoſe of thoſe dates have been produced before me to ſupport the title thereto: but it appears by the affidavits of Richard Dugdale and Mary Walmeſley, that the ſaid Thomas Pinder and his anceſtors had been long in poſſeſſion of the houſe ſold by him; and that the ſaid Stringer, and thoſe of whom he purchaſed, had been likewiſe long in poſſeſſion of the ſaid burgage ſold by him; and it alſo appears by the affidavit of the defendant Thomas Stanley, produced before me, that the mortgage mentioned in the ſaid complainant's bill, which was by Mary Parker, widow, mother of the defendant Stanley's wife, made to one Robinſon of part of the premiſes in queſtion for one thouſand years, had been paid off; but the defendant Stanley hath produced no aſſignment, ſurrender, or releaſe thereof. And I do alſo find by other deeds laid before me, that ſeveral of the ſaid burgages, part of the premiſes in queſtion, were purchaſed by Mary Parker, mother of the defendant Stanley's wife, or her truſtees, and are liable to ſeveral truſts of 1300l. which by the marriage-ſettlement of Anthony Parker and the ſaid Mary his wife, who were father and mother of the defendant Stanley's wife, were to be laid out in purchaſing lands to be ſettled on the ſaid Anthony Parker and Mary his wife and the heirs of their bodies, remainder to Anthony in fee; for which reaſon I conceive the eſtate tail only in this truſt is barred by the fine, and that a recovery is ſtill requiſite to bar the remainder, which did deſcend to Chriſtopher Parker, ſon of Anthony and Mary Parker, and brother of Catherine Stanley, the now defendant's wife, and was liable to his diſpoſal, incumbrances, and debts, and will take place when there is failure of iſſue of the ſaid Anthony Parker and Mary his wife. And there has alſo been produced before me, a copy of a judgment

obtained

obtained in Trinity Term, *anno decimo Willielmi Tertiæ regis*, &c. wherein Henry Stevens, esq. is plaintiff, and William Stringer, of Gray's-Inn, esq. defendant, for the sums of six hundred pounds debt, and one hundred shillings costs, which judgment was afterwards revived by *scire facias*, and judgment had thereupon in Hilary Term, *anno primo Georgii nuper regis*; and the said judgment does not appear to me to be satisfied, but to be still subsisting; and that the house purchased by the defendant Stanley from the said William Stringer, esq. for the sum of forty-two pounds, is liable to and still stands charged with the said judgment. And I do also find all the title-deeds and papers relating to the premises in question, at the time of executing the lease and release, were in the custody or power of the said defendant Stanley, or his agents, and never were produced, or an abstract thereof shewn or delivered to the complainant, or his solicitor, before the 4th day of May 1725 (though often demanded, as charged in the plaintiff's bill). On that day an abstract of several deeds relating to the premises in question was delivered to the plaintiff's solicitor, with notice thereunder written in the words following, *viz.* "The several deeds, will, and "decree in this abstract mentioned, are in my hands ready "to be produced and shewn to the plaintiff's counsel; and "the defendant Stanley and Catherine his wife declare "themselves willing and ready to execute any other or "further assurance of the premises already purchased by "plaintiff, for the more perfect and better conveying the "same to the plaintiff and his heirs—EDWARD STAN-"LEY, solicitor *pro* defendant." And I do further humbly certify, that the defendant Stanley, at the time when he executed the said deeds of lease and release to the complainant Haldane, had not a sufficient title or power to convey the said premises alone without the said Catherine his wife, nor could a good title be made to the same without her joining in a common recovery: and that the said judgment against the said William Stringer was then subsisting and in force. All which I humbly certify, and submit to the judgment of this honourable court.

OBJECTIONS *to the* TITLE *are as follows*:

No deed declaring the uses of the fine levied in 1717.
No old deeds of the title to Pinder's tenement before 1717.

ONE

ONE of the burgage-houſes bought of Stringer in 1715, which houſe is ſubject to ſeveral judgments recovered againſt Stringer.

No leaſe or aſſignment of the mortgage to Robinſon.

No recovery ſuffered of part of the premiſes ſubject to a ſettlement made by the defendant Stanley's father and mother—which is reported requiſite.

Now it is propoſed by the defendant,

To levy a new fine of all the premiſes:

To procure a diſcharge from mr. Darby (who has an aſſignment of the judgments againſt Stringer), and that the ſaid houſe ſhall not be ſubject to the judgments:

To procure an aſſignment of the mortgage, or a releaſe:

To ſuffer a recovery.

Therefore your opinion is deſired to know, Whether when the defendant Stanley has done all things as above, and when done, Whether you are of opinion that the court will oblige mr. Haldane to accept of the title or not? Quere.

I CONCEIVE, if the defendant procures the burgage purchaſed from Stringer to be diſcharged from his judgments, procures an aſſignment or releaſe of Robinſon's judgment, and ſuffers a recovery wherein he and his wife are vouched, the court will oblige mr. Haldane to take the title. Anſwer.

21ſt May, 1729. J. WARD.

TOLLS

TOLLS.

CASE.

The lord of a manor claims and collects daily tolls upon a high road paſſing through his manor; and, on the holding of certain fairs at towns lying remote from and unconnected with his manor, doubles them, under pretence of a preſcription, without being ſubject on his own part to any duty or charge.—The ſeveral OPINIONS of Mr. PEMBOT and Sir FLETCHER NORTON upon the legality of ſuch claim.

UPON that part of the king's high road leading from the *city of Carliſle to the town and county of Newcaſtle upon Tyne* which lies through a town called Hexham, the lord of the manor of Hexham aforeſaid takes and receives the following tolls, *viz. for a pack of leather carried by one horſe*, 2d; for a pack of wooden clogs carried by one horſe, 2d; for a corded pack of any other goods, 1d.; for a ſlung pack, that is, a pack tied by the middle, of any other goods, 0½d.; and during the time that the fairs are called to be holden at Hexham aforeſaid, which are each called to hold for nine days, the ſaid tolls are all double; for his ſole uſe and benefit, which he claims *ſometimes by preſcription, and ſometimes by an antient grant, in conſideration of the ſaid road lying through his manor*. And upon that part of the ſaid road which lies through a village called Corbridge, the lord of the manor of Corbridge aforeſaid takes and receives the following tolls, *viz.* for a led horſe, 3d.; for black cattle, 1*d. per head*; for ſheep, 4*d. per ſcore*; 6*d. per cart for corve rods* (tho' timber pays nothing); for a corded pack of cloth, hams, and leather, carried by one horſe, 1d; for a corded pack of any other goods, 0½d.; and during the time that the fairs are called to be holden at a place called Haggſhawbank, about a mile and a half from Corbridge aforeſaid, and at Newcaſtle aforeſaid, about twenty miles from Corbridge aforeſaid, which are each called to be holden for nine days, the ſaid tolls are all double, and for every thing that is either bought or ſold at the fairs holden at Haggſhawbank aforeſaid, but what cannot be particularly learned, for his ſole uſe and benefit, which he alſo claims ſometimes by preſcription, and ſometimes by an ancient grant, in conſideration of the ſaid road lying through his manor.

NOTE, THESE fairs are not held upon the king's high road upon which the tolls are taken, nor are the tolls taken in right of holding ſuch fairs, but in right of the ſeveral goods above-mentioned being carried or conveyed upon

upon and along thoſe parts of the ſaid roads above-mentioned.

THE tolls are collected from day to day during the whole year, and not confined to the time when ſuch fairs are held: the fairs are mentioned as a circumſtance to ſhew the unreaſonableneſs of the tolls, *viz.* that they which are collected in right of a way or road ſhould be enlarged on account of fairs being holden at a place to which ſuch way or road has no immediate relation or connection.

LORD COKE in his "Compleat Copyholder," p. 44, ſays—"Preſcriptions ought to be upon good conſideration; and therefore if the lord will preſcribe that whoſoever paſſeth through the king's highway which lieth through his manor ſhould pay him 1d. for paſſing, this preſcription is void, becauſe it is not upon a good conſideration: but if he will preſcribe to have 1d. of every one that paſſeth over ſuch a bridge within his manor, which bridge the lord doth uſe to repair, this is a good preſcription, and upon a good conſideration."

WHETHER or no the lords of the ſaid manors can juſtify and maintain the taking of the tolls aforeſaid, in caſe they ſhall be able to ſhew any antient grant thereof, or make out any preſcriptive right, conſidering the conſiderations for which theſe tolls are given? and, What conſiderations are ſufficient to juſtify the taking and receiving of tolls? 1. Quære.

I AM of opinion, that if the roads lie over, and the fairs are held upon, the ſoil of the lords of the manors they may well juſtify the taking theſe tolls, becauſe no man has a right to paſs over another man's ground without his conſent; and it muſt be preſumed that the lords conſented originally to ſuffer theſe roads to be made, and the fairs to be held, in conſideration of theſe tolls. Mr. PERROTT's Anſwer to the Firſt Quære.

IN caſe it ſhall be thought that the taking of ſuch ſaid tolls is illegal, and contrary to law, Whether or no the collectors thereof will not be looked upon in law as extortioners, and ſo compellable to refund ſo much thereof as have been collected within theſe ſix years laſt paſt? and if ſo, Whether or no an action upon the caſe will not be moſt proper for that purpoſe? and if the lords ſhould for the future employ inſolvent perſons to ſeize upon any horſes or cattle for the payment of ſuch tolls, What will 2. Quære.

be

be the moſt adviſable method to be taken in order to guard againſt ſuch interruptions and diſturbances?

Mr. Perrott's Anſwer to Second Quære.

WHERE toll is unjuſtly taken, an action will lie for money had and received; or, if the toll-gatherer diſtrains for the toll, an action of treſpaſs will lie againſt him and the lord by whoſe authority he acts (if you can prove the lord employed him); or you may replevy the diſtreſs: but I do not ſee any ground to diſpute the legality of the toll in queſtion, if it has been always taken.

Inner Temple, GEO. PERROTT.
3d November 1755.

Mr. Perrott's further Opinion.

I HAVE, as deſired, reconſidered this Caſe; and though it be true, that a man cannot preſcribe for toll through the king's highway without ſhewing either that he repairs the road, maintains a bridge, or does ſomething elſe for the benefit of paſſengers, yet if he can ſhew that he does any of theſe things, he may preſcribe for ſuch tolls. Again: Any man may preſcribe for toll for paſſing over his lands: and though the places where the toll is now claimed for paſſage may be now highways, yet, I think, toll having been always paid, is the ſtrongeſt evidence that they were originally the lord's own ſoil, and that he ſuffered them to be uſed as a way in conſideration of the toll. The biſhop of London to this day has a conſiderable toll at Highgate, one of the greateſt high roads in the kingdom; and many other tolls are paid in ſimilar caſes in other places; and therefore I ſtill am of the ſame opinion that I was before.

10th January 1755. G. PERROTT.

Sir Fletcher Norton's Anſwer to the Firſt Quære.

I AM of opinion, under the circumſtances of this Caſe, the lords of the manors are entitled to no tolls for paſſage of goods

goods along the king's highway in the manner ſtated; for whoever claims *toll thorough* (which is a demand odious in law, and almoſt againſt common right) muſt found his claim in ſome good conſideration, which is a charge upon himſelf and a benefit to the public; as the making ſome cauſeway, repairing ſome road, maintaining ſome banks of rivers, bridges and fences, or the like: theſe and ſuch like conſiderations might be ſufficient to juſtify the taking a reaſonable toll for paſſage; but nothing of this ſort occurs in the preſent inſtance: and indeed if they did, the doubling the tolls in the times of fairs at places ſo remote from thoſe where the tolls are collected, and with which they have no connection, ſeems very unjuſtifiable and illegal.

I THINK an action upon the caſe for money had and received will lie againſt the toll-gatherer by the perſon who pays ſuch toll, and that ſuch action may be brought at any time within ſix years after the payment: but the proper way to bring the right in queſtion, and to have the whole matter appear upon record, would be for ſome perſon to refuſe payment of the toll, and ſo oblige the collector of the tolls to diſtrain, and then bring an action of treſpaſs againſt him for taking ſuch diſtreſs. If the lords of the manors ſhould employ perſons of inſolvent circumſtances to collect the tolls, the party aggrieved by paying has no remedy but againſt the perſon who does him the wrong, unleſs he can prove that ſuch perſons act by orders from the lords; and then they may be made defendants, as the acts of their agents will in ſuch caſe become their acts. But this, I apprehend, will be impoſſible to be proved.

Sir FLETCHER NORTONS Anſwer to the Second Quære.

Lincoln's Inn,
23d April 1756. FL. NORTON.

TRUSTS.

CASE 1.

A teſtator deviſes his ſettled eſtate, in purſuance of a power, to truſtees for 100 years, for raiſing a ſum of money for his younger children, and deviſes certain hereditaments to his eldeſt ſon in fee, upon condition of paying the teſtator's debts, and alſo a ſum into the hands of the ſaid truſtees, as additional portions for his younger children. After the teſtator's death, the ſon, becoming involved in debt, conveys part of the charged and deviſed eſtates to truſtees and their heirs, for raiſing a ſufficient ſum, together with a certain ſum therein mentioned, for payment of the teſtator's younger childrens' portions, and other debts and incumbrances therein referred to. The ſon's creditors becoming preſſing, he prevails upon his younger brothers and ſiſters to join in a mortgage of part of the truſt eſtate, for raiſing money to ſatisfy them, but ſtill leaves the portions unpaid; and having miſapplied a ſum of money which had been appropriated for that purpoſe, induces the younger children to accept of his notes of hand to the amount of this ſum, and then to concur in a ſale of the eſtate.—Mr. KENDRICK'S OPINION, Whether the younger children, by the acceptance of notes from their brother for part of their portions, had diſcharged the truſt eſtates *pro tanto*, and adviſing the truſtees generally how to act.

ROWLAND WYNNE, eſq. by will reciting a power to him reſerved by his marriage-ſettlement, did, in purſuance and in execution thereof, ſubject and charge all his ſettled eſtate with the payment of 800l. to his younger children; and for the more effectually raiſing and paying thereof, did deviſe his ſaid real eſtate to truſtees for a term of 100 years; and by the ſame will deviſed certain lands, whereof he was ſeiſed in fee, unto his eldeſt ſon and heir William Wynne, and his heirs, upon condition that his ſaid ſon ſhould pay all his juſt debts and funeral expences, and alſo pay into the hands of his ſaid truſtees the ſum of 300l. additional portions for his younger children therein particularly named; and made the ſaid William Wynne executor; and died, without revoking the ſame, indebted to ſome perſons, and particularly to David Williams, mercer, in about 46l. ſhop-book debt.

AFTER his death his ſaid ſon and heir William Wynne entered upon all his eſtate real and perſonal; and having ſuffered a common recovery of the ſaid real eſtate to him and his heirs, contracted ſeveral debts, and ſecured the ſame by mortgages and judgments; and in the year 1728, by indentures of leaſe and releaſe, being a ſettlement made previous to his marriage with *A.* his now wife, he the ſaid William Wynne in conſideration of the ſaid marriage, and of 1500l. portion, did convey all his real eſtate to certain truſtees for the uſes therein mentioned, *(viz)*. as to part thereof, to the uſe of himſelf and *A.* his intended wife for their lives, for the jointure of the ſaid *A.*; and then to the iſſue of the ſaid marriage in tail: and as to the reſidue thereof, to the uſe of the truſtees and their heirs upon

truſt,

truſt, by mortgage or ſale thereof, or of any part thereof, to raiſe ſuch ſum or ſums of money as, together with the ſaid 1500l. would be ſufficient to pay all their portions to the brothers and ſiſters of the ſaid William Wynne (being the ſaid Rowland Wynne's younger children,) and all other debts and incumbrances which might affect or incumber that part of the eſtate as was thereby ſettled: and if any overplus ſhould be, then ſuch overplus ſhould go to portion the younger children of William Wynne.

About the year 1732, the ſeveral mortgagees and judgment creditors became uneaſy and preſſing for their money. In order to pay them off, he the ſaid William Wynne and his ſaid truſtees borrowed of biſhop Tanner 1600l. on mortgage of the ſaid truſt eſtate, and applied the ſame, together with the ſaid 1500l. marriage portion, towards diſcharging ſuch of thoſe incumbrances as were prior to the ſaid ſettlement, but left the brothers and ſiſters portions ſtill unpaid: and the ſaid William Wynne having theretofore got into his hands and miſapplied about 300l. part of the ſaid 1500l. marriage portion, the brothers and ſiſters (being four in number) were prevailed upon (for the healing of that miſapplication) to take their brother's notes of hand for 75l. each, and to join in the conveyance to the biſhop and to give way to the payment of his 1600l. and intereſt before that 300l. of their portions.

In the year 1737, ſome of the brothers and ſiſters becoming uneaſy for their fortunes, and the biſhop's intereſt being not duly paid, and other creditors being preſſing for money, the ſaid truſt eſtate was ſold by the ſaid William Wynne and the truſtees (the brothers and ſiſters ſtill joining) for about 2600l. which money was applied to pay 200l. due by mortgage from the ſaid Rowland Wynne in his life-time, and the ſaid biſhop Tanner's principal and intereſt, being about 1800l. and alſo the brothers and ſiſters' part of their fortunes; but in regard they had joined in the conveyance to the biſhop, and taken their brother's notes, it became a doubt whether they had not altered their ſecurities, and whether the truſtees could pay them that 300l and conſequently part of the purchaſe money (though not ſufficient to diſcharge that ſum) was retained by the truſtees until they could be adviſed how they might with ſafety apply the ſame. And mr. Robert Williams the executor of the ſaid David Williams, doth alſo demand the ſaid 46l. as a debt of the teſtator Rowland Wynne's; though upon examination into that affair it appears, that the

the ſaid executor hath, ſince the laſt mentioned ſettlement, accepted of the ſaid William Wynne's bond and judgment for ſecuring to himſelf that money, among other monies owing to him from the ſaid William Wynne; but the ſaid executor doth inſiſt, that he took the bond and judgment only as a further ſecurity *quoad* the 46l. that original debt ſtill ſubſiſting upon the face of the ſaid David Williams's ſhop-books.

THE ſaid William Wynne, being ſtill much moleſted for debts by him contracted ſince the ſaid ſettlement, has prevailed with his brothers and ſiſters to give way (ſo far as in them lies) to the truſtees paying what remains in their hands towards extricating their brother the ſaid William Wynne out of his preſent difficulties, and to accept of what ſecurity their ſaid brother can give them for the ſame.

Quære. MAY the truſtees, with the concurrence of the brothers and ſiſters, pay what they have ſo retained to, or to the uſe of, the ſaid William Wynne? or, May the ſaid Robert Williams lay claim to 46l. thereof, or otherwiſe recover that ſum by and under the will of the ſaid Rowland Wynne, notwithſtanding his having accepted of the freſh ſecurity? How ſhall the truſtees act herein with ſafety to themſelves, and as little expence to the truſt as may be?

Anſwer. I DO not find by the Caſe, that the 300l. for the younger children of Rowland was charged on the eſtate directly, but only it was the condition on which the fee ſimple eſtate was deviſed to mr. William Wynne; but as he was heir at law to the eſtate, and could not take advantage of the breach of the condition, a court of equity will eſteem that as a charge upon the eſtate.

AND therefore the truſt created by mr. William Wynne's marriage ſettlement, as to the reſidue of the eſtate, being to pay all the debts and incumbrances affecting the ſelled eſtate, if any of the ſelled eſtate was part of that deviſed by the father Rowland to his ſon William Wynne, that was firſt to be paid, and the overplus was to go to mr. William Wynne's younger children: and therefore I cannot

cannot ſee how the truſtees can apply the overplus to pay any of mr. William Wynne's debts.

And as to the 300l. which mr. William Wynne prevailed on his brothers and ſiſters to accept of his perſonal ſecurity for, I conceive they, having joined in conveyance to the biſhop on taking thoſe ſecurities, are bound by them, and cannot revert back to the eſtate for that money: but if their joining in ſecurity to the biſhop was only intended to diſcharge that part of the eſtate, but not the reſt, then the reſt of the eſtate ſhould remain liable; but as they took other ſecurities from mr. William Wynne, I think it will be in equity a diſcharge of the whole eſtate from the ſaid 300l. But if it was agreed at the time of thoſe bonds given to the brothers and ſiſters, that the reſt of the eſtate ſhould ſtill remain charged with the ſaid 300l. then I conceive that 300l. is ſtill to be raiſed; and if ſo, the brothers and ſiſters, when they have it, may lend it mr. William Wynne: but I cannot adviſe the truſtees to raiſe the money without the brothers and ſiſters, or a decree of a court of equity.

And I conceive the executor of David Williams having accepted of a ſecurity for the 46l. amongſt other money, will be taken as a diſcharge of the eſtate from that debt, unleſs the executor can prove expreſsly, that the new ſecurity was only intended as accumulate ſecurity, which will lie upon the executor to prove.

Therefore I do not ſee how the truſtees can apply any of the overplus money to pay the brothers or ſiſters, or the executor of David Williams, the overplus being by the ſettlement a declaration of the truſt to be applied to the younger children of William Wynne; and to apply it otherwiſe will be a breach of truſt.

As to the deficiency of the rents from what they were given in, if the eſtate was ſold by the rent-roll barely, and only then, there ought to be a deduction out of the purchaſe-money for that deficiency; but if, after the rent-roll

purchaſed, the purchaſer agreed for the eſtate by the lump, though in general the rent-roll might be his guide in bidding, yet by lumping of it the purchaſer is tied down to pay the price agreed on without any allowance for the deficiency, for by that lumping of it he quits any pretenſions of buying by the rent-roll.

As to any rent mr. Wynne received after the time the contract was to take place, I conceive ſatisfaction is to be made him for that, and mr. Wynne ought to refund that money.

8th September 1738. AND. KENRICK.

CASE 2.

Huſband and wife ſurrender copyhold hereditaments to the uſe of one in fee, for ſecuring 200l. and intereſt. Mortgagee marries *A. B.* and afterwards dies; and her heir at law, upon a compoſition with *A. B.* acknowledges himſelf a truſtee for the latter as to this mortgage. *A.* truſtee for the feme mortgagor, advances money for his *ceſtui que* truſt to *A. B.* upon his bond, and a promiſe of an aſſignment are aſſigned to Whether the 200l. ſecured by mortgage may be applied by the co-truſtee in payment of the wife's truſt-money.

RECORD HASTINGS, and Elizabeth, being then his wife, on 17th January 1714, ſurrendered four tenements and a half to mr. Parr and mr. Hawkins, lying in Stepney, *in com. Midd.* in truſt for Rachel Rogers and her heirs, for payment of 200l. and intereſt.

JOHN THOMPSON intermarried with ſaid Rachel, and ſhe is ſince dead; and upon her death George Sterry, her couſin and heir at law, was admitted tenant of ſaid premiſes.

THAT about June 1723 following, Sterry and Thompſon agreed, that Sterry ſhould receive out of ſaid Rachel's perſonal eſtate 2000l. and was, on receipt thereof, to aſſign all the reſt, both real and perſonal, to Thompſon; which ſaid 2000l. was paid him by Thompſon.

THAT by virtue of ſaid agreement Thompſon was entitled unto ſaid 200l. mortgage, and thereupon borrowed of ſaid Elizabeth, in the name of John Scott her truſtee, being the money of ſaid Elizabeth, ſeveral large ſums of money, amounting to more than ſaid 200l. and intereſt, for which he gave bond in Scott's name, with a promiſe to ſurrender ſaid premiſes to ſaid Elizabeth, or to ſome perſon in truſt for her, and to deliver up ſaid mortgage, and ſettle accounts, and pay the balance: but before he ſurrendered of the mortgage; and *A. B.* afterwards becoming inſolvent, his effects the ſame truſtee for the benefit of his creditors.—MR. GREEN'S OPINION,

ſurrendered ſaid premiſes, delivered up the ſaid mortgage, or ſettled ſaid accounts, he became inſolvent, and, on 15th July 1729, was cleared by an inſolvent act, and on the 28th of November following his effects were aſſigned to the ſaid John Scott and Caleb Redſhaw.

THAT the equity of redemption of the ſaid premiſes was alſo many years ſince ſettled on ſaid Scott, in truſt for Elizabeth's ſeparate uſe, and for the uſe of her heirs and aſſigns for ever.

WHETHER ſaid 200l. mortgage and intereſt ought not to pay off and be outſetted againſt ſo much of the money borrowed of the ſaid Elizabeth in the name of the ſaid Scott as aforeſaid as the ſame will extend to, being mutual debts, which, by ſaid inſolvent act, are to be ſet the one againſt the other? and, How ſaid Elizabeth muſt proceed thereon? and, Whether Scott cannot aſſign his truſt both as to the equity of redemption of ſaid premiſes, and alſo as to the money lent ſaid Thompſon, which was ſaid Elizabeth's money as aforeſaid? and, Whether he cannot appoint ſome other perſon to act for him in the management of ſaid Thompſon's affairs, as aſſignee under the ſaid act as aforeſaid? Quere.

I AM of opinion, that mr. Sterry having received ſatisfaction for his demands upon the eſtate of the late mrs. Rogers, he is by the agreement with mr. Thompſon become a truſtee for him as to the 200l. mortgage money and intereſt. And if upon ſtating the mutual credit between mrs. Hawkins and her truſtee mr. Scott with mr. Thompſon it ſhall appear that the balance is in favour of mrs. Hawkins, I think the aſſignees of mr. Thompſon ſhould direct mr. Sterry to ſurrender the mortgaged premiſes to mrs. Hawkins, or to whom ſhe ſhall direct; and mr. Thompſon ſhould releaſe his right thereto. I am alſo of opinion, that ſo far as mr. Scott is a truſtee for mrs. Hawkins, he may aſſign his truſt; but as one of the aſſignees of mr. Thompſon's eſtate (there being two aſſignees), the appointment for any other perſon to act therein muſt be by a joint authority from him and mr. Redſhaw; or the one may releaſe to the other of them. Anſwer.

EDW. GREEN.

CASE 3.

A teſtator, after diſpoſing of ſome part of his eſtates, deviſes all the reſidue and remainder thereof unto his executrix in fee; and ordered and directed that his ſaid executrix ſhould diſpoſe of the ſame amongſt his grandchildren when and as ſhe thought proper; but in caſe ſhe ſhould marry again, that then the ſaid deviſe ſhould be void. Teſtator then appoints S. H. his executrix, and afterwards dies.—Mr. BOOTH's OPINION, In what manner a good conveyance may be made to a purchaſer.

MR. RICHARD HUSKE, by his will, dated the 9th of February 1757, after ratifying his wife's jointure, and deviſing ſome eſtates therein particularly mentioned to his grandſon Broomſall Huſke in fee, deviſes in the words following:

"And as to all the reſt, reſidue, and remainder, of my "real eſtate, in reverſion or otherwiſe, I give and deviſe "unto my ſaid executrix, and her heirs and aſſigns for ever, "ſubject nevertheleſs to the ſeveral truſts, conditions, "and payments, hereinafter expreſſed and directed; that "is to ſay, that my ſaid executrix ſhall permit and ſuffer "my ſaid wife to live and dwell in my houſe in Bridge-"ſtreet, where I formerly lived (rent free), or otherwiſe "to permit her to let or demiſe the ſame to any perſon or "perſons whatſoever for the term of her life, in purſu-"ance of her marriage-jointure: and in caſe ſhe ſhall "think fit to live in the ſame, then my will and meaning "is, and I do hereby order and direct, that my ſaid execu-"trix ſhall and do pay the land-tax and quit-rent for the "ſaid premiſes yearly, as often as they ſhall reſpectively "become due and payable. And from and after my ſaid "wife's deceaſe, my will and meaning is, that all my ſaid "real eſtate, of what kind or nature ſoever, I order and "direct that my ſaid executrix ſhall and do diſpoſe of "the ſame, or convey and ſurrender all or any part or par-"cel thereof, to and amongſt all or any of my ſaid grand-"children, when ſhe ſhall think fit and proper ſo to do; "or otherwiſe to deviſe the ſame, or any part or parcel "thereof, to all or any of my ſaid grandchildren, in and "by her laſt will and teſtament in writing, as ſhe ſhall "think fit and proper ſo to do, ſo as the ſaid real eſtate ſo "deviſed be diſpoſed of by my ſaid executrix to and "amongſt my ſaid grandchildren in her life-time; or by "her will in ſuch manner as ſhe ſhall think fit and proper "ſo to do. But in caſe my ſaid executrix ſhall inter-"marry again, then my deviſe ſo to her made as above, re-"lating to her and my ſaid grandchildren, ſhall be null and "void to all intents and purpoſes from the day of ſuch "marriage: and from and after her intermarriage, that "then ſuch my ſaid real eſtates ſo deviſed to my ſaid exe-"cutrix in truſt as above (excepting my real and perſonal "eſtate ſituate, lying, and being in Milton, or near adjoin-"ing in the county of Bedford, which will go to my grand-

"ſon

" ſon John Robert Throckmorton Huſke, as my heir at " law), I give and deviſe unto my ſaid grandſon Broom- " ſall Huſke and his heirs for ever (any thing herein-be- " fore contained to the contrary notwithſtanding)."

THEN he appoints his friend mr. Thomas Want ſuperviſor of his will, and deſires him to aſſiſt his executrix in carrying his will into execution, and performing the ſeveral truſts.

AND then he appoints his daughter-in-law Suſannah Huſke, widow, full and ſole executrix of his ſaid will.

THE teſtator died about eight months ago, leaving Suſan his wife, who is now living, and Suſannah Huſke his daughter-in-law, who has proved the will, and four grandchildren, *viz.*

JOHN ROBERT THROCKMORTON HUSKE, who is of age
———— HUSKE, who is of age.
BROOMSALL HUSKE, who is under age.
CATHERINE HUSKE, under age.

WHAT eſtate does Suſannah Huſke take under the above deviſe? 1. Quære.

SUSANNAH HUSKE ſeems to take the whole legal eſtate in fee; but in the truſt or beneficial intereſt ſhe ſeems only to have an eſtate for life, determinable on her marriage (except as to the houſe in Bridge-ſtreet given to Suſan for life), with a power to the ſaid Suſannah Huſke the executrix to make any diſpoſition by deed or will of the whole real eſtate among all or any of the grandchildren. Anſwer.

WHAT eſtate does Broomſall Huſke take under the ſame? 2. Quære.

I THINK, Broomſall Huſke takes no veſted intereſt in the real eſtate until Suſannah the executrix marries again. In that event, I think, he will be immediately entitled to the beneficial intereſt in fee ſimple, and perhaps to the legal eſtate in fee, in all the real eſtate, except what lies in or near Milton, which in that event is to go to John Robert Throckmorton Huſke in fee. Anſwer.

CAN

3 Quære. CAN a good title be made to a purchaſer of any of the premiſes (they being conſiderable) deviſed under the above clauſe? and, By what means of conveyance? and, Who muſt be parties, and execute the ſame?

Anſwer. IF Suſannah the executrix makes a diſpoſition of any of the premiſes, except the houſe in Bridge-ſtreet, to both or either of the ſons that are of age, to hold to him or them in fee, and they afterwards convey by leaſe and releaſe, or bargain and ſale inrolled, to a purchaſer, and then the wife conveys her beneficial intereſt, *viz.* her eſtate for life, and alſo her legal eſtate and intereſt in fee, to or in truſt for ſuch purchaſer, it may do to give a title to a purchaſer, as I apprehend.

Lincoln's Inn, JA. BOOTH.
20th April, 1761.

CASE 4. WILLIAM HARDY (father of John Hardy), of the parish of Great St. Mary's in the town of Cambridge, innholder, (being poſſeſſed of a freehold houſe, with its appurtenances ſituate, ſtanding, and being in the ſaid parish of Great St. Mary's in Cambridge aforeſaid, commonly called or known by the name of the Red Cow), on the 28th day of February 1731 made his will, and thereby gave, bequeathed, and diſpoſed of the ſame, and all his goods and chattels to his wife Ann Hardy, in manner following:—Firſt, He ordered and appointed his debts and funeral charges to be ſatisfied, contented, and paid by his executors; and, in the next place, for her wholly and ſolely

W. H. by his will gives a freehold eſtate to his wife in truſt to ſell the ſame for the benefit of his children, if any ſale could be made thereof to advantage; but if otherwiſe, he empowers his wife to permit his ſecond ſon to retain the eſtate, on payment of ſuch ſums as the wife ſhould appoint. The teſtator dies; the wife enters, and enjoys the eſtate during her life, and by her will deviſes the ſame in truſt to ſell, and to pay the purchaſe-money unto her children and grand-children in the manner therein directed. Teſtatrix dies, and her truſtee renounces: the heir at law of the teſtator then enters, and afterwards joins in a power of attorney for a ſale of the eſtate. One of the truſtees under this power then gets poſſeſſion, and refuſes to account for the rents.—Mr. WILBRAHAM'S OPINION upon the validity of the wife's diſpoſition of the eſtate, upon the ſeveral rights of the different perſons claiming intereſts therein under a contrariety of truſts and diſpoſitions.

ſolely to ſell and diſpoſe of the ſame amongſt his children at her deceaſe; and if any advantage happened that a good purchaſer offered, to ſell the ſame at the beſt hand, and ſhe his ſaid wife to divide the money raiſed from the eſtate thereof amongſt his children by her laſt will and teſtament, or otherwiſe at her diſcretion: and he further willed, if no ſuch offers of advantage happened for the ſale thereof, that if his ſon John was able to pay ſuch legacies out of the ſaid houſe as it ſhould pleaſe his ſaid wife to appoint, that he ſhould pay them and keep the ſaid houſe. The ſaid teſtator by ſaid will further declared his ſon William Hardy (who was his eldeſt ſon) had then already had his portion equivalent to what his other children's parts, he believed, would amount to; and therefore he gave and bequeathed unto his ſaid ſon William Hardy the ſum of one ſhilling and no more; but declared his ſaid wife might afterward conſider him, as he behaved himſelf to her, as ſhe pleaſed. All the reſt of his goods and chattels, debts, and monies due and owing to him by any perſon or perſons, in any place or places whatſoever, he gave and bequeathed unto his loving wife Ann Hardy, whom he conſtituted and appointed whole and ſole executrix of his ſaid will.

THE ſaid teſtator died in the year 1740 without altering or making void the ſame; and upon his death the ſaid Ann Hardy his widow and executrix duly proved the ſame in the Archdeaconry Court of Ely the 28th day of February 1740; and by virtue of his ſaid will ſhe poſſeſſed herſelf of the ſaid freehold houſe and premiſes, and alſo of all his perſonal eſtate, to a very conſiderable value; but did not ſell the ſaid houſe, which ſhe might have done by virtue of her huſband's will, but inſtead thereof lived in the ſaid houſe during her life, and diſpoſed of the greateſt part of the perſonal eſtate to and amongſt ſuch of her children, and other perſons, as ſhe thought fit, contrary to the will and intentions of her ſaid huſband.

THAT the ſaid Ann Hardy, the widow and executrix of the ſaid William Hardy, duly made and publiſhed her laſt will and teſtament in writing, bearing date the 7th day of March 1740, and thereby deviſed and gave all that her freehold meſſuage or tenement, commonly called or known by the name or ſign of the Red Cow, in Cambridge aforeſaid, and every part and parcel thereof, and all her right, title, property, claim, and demand, of and in the ſame, with the appurtenances, and all and ſingular her perſonal

perſonal eſtate whatſoever and whereſoever, to her truſty friend mr. Jeremiah Beard, of Cambridge aforeſaid, his heirs and aſſigns for ever, in truſt to ſell the ſame, and to pay thereout to her grandſon Samuel Hardy 10l. to her grand-daughter Ann Hunter 10l. to Mary Hunter her grand-daughter 10l, to her ſons William Hardy and John Hardy five guineas each; and to diſpoſe of the remainder between her two daughters Ann and Jane, and all her grandchildren (except thoſe three to whom ſhe had reſpectively given the ſpecific legacy of 10l. each), in equal diſtribution; and ſhe intreated the ſaid mr. Beard to be executor of her will, and to accept in good part a ſmall preſent of two guineas for his trouble, after deduction to be by him made of all manner of charges and expences any way touching his truſt reſpecting her will.

THE ſaid teſtatrix died in or about the year 1742; and upon her death the ſaid Jeremiah Beard her executor renounced, in due form of law, all his right and intereſt given him in and by the will of the ſaid Ann Hardy; and thereupon adminiſtration, with the will annexed of the ſaid Ann Hardy, of all her eſtate and effects, was granted by the archdeacon of Ely the 27th day of January 1742 to William Hardy her eldeſt ſon; who by virtue thereof poſſeſſed himſelf of the ſaid freehold houſe, and alſo of all or the greateſt part of the perſonal eſtate of the ſaid teſtator William Hardy left unadminiſtered by his ſaid mother Ann Hardy at her death, and applied and diſpoſed thereof as he thought proper, without any regard had to his ſaid father's will; and ſoon after died inteſtate and inſolvent; but left a ſon, who is now of age, though no adminiſtration yet taken by him (or any other perſon) to the ſaid William Hardy his father, who was adminiſtrator to the ſaid Ann Hardy as aforeſaid.

THE ſaid William Hardy, ſon of the teſtator, ſome time before his death (*viz*) on the 25th day of February 1742, Ann Hunter (wife of Daniel Hunter), and John Hardy, three of the lawful children of the ſaid William Hardy the teſtator, and alſo three of the legatees named in the will of the ſaid Ann Hardy their late mother, duly executed a power of attorney (Jane Cook, wife of Joſeph, another of the daughters of the ſaid teſtator, and a legatee named in the will of the ſaid Ann Hardy, refuſing to execute the ſame) to the ſaid Jeremiah Beard, Thomas Higgins, and the above named Daniel Hunter, jointly and irrevocably for them to ſell, demiſe, grant, and convey abſolutely,

ſolutely, in fee ſimple, the aforeſaid meſſuage or tenement, with the appurtenances thereunto belonging, for ſuch price or ſum of money, and to ſuch perſon or perſons, as they ſhould think fit and convenient; and to ſeal, execute and deliver, ſuch conveyances as ſhould be neceſſary for that purpoſe; and alſo to ſell and diſpoſe of all and ſingular the goods and chattels, and all other the perſonal eſtate of their ſaid father and mother deceaſed, and to receive what debts were owing to them, and alſo what rent was then or ſhould afterwards become due for the ſaid meſſuage or tenement, till ſuch time as the ſame could be ſold; and they jointly to give receipt or receipts for the ſame, and to pay what debts they the ſaid William and Ann Hardy owed at their deaths, and their funeral charges; and alſo what expences they ſhould be at in ſelling the ſaid real and perſonal eſtates, or in any thing relating thereto, out of ſuch monies as they ſhould receive by virtue of the ſaid power of attorney; and to pay the overplus to the ſaid William Hardy, Ann Hunter, John Hardy, Joſeph or Jane Cook, in equal proportions.

THAT ſaid Jeremiah Beard, in conſideration of five ſhillings of lawful money of Great Britain to him in hand paid by the ſaid Daniel Hunter, by indentures of leaſe and releaſe conveyed all his right, title, &c. to ſaid eſtate given him in and by the will of the ſaid Ann Hardy, to ſaid Daniel Hunter, his heirs, &c. for ever, which he had no right to do, having before renounced his executorſhip to William Hardy, ſon of the teſtator, as above-mentioned; and ſaid Daniel Hunter hath ever ſince the ſaid power of attorney was given to him, Beard, and Higgins (which two laſt never acted), and getting ſaid indentures of leaſe and releaſe from Beard as aforeſaid, let ſaid houſe and premiſes at 15l. *per annum*, and received the rents and profits thereof, and applied the ſame to his own uſe (without rendering any account thereof to the ſaid John Hardy, or the ſeveral other perſons named in the ſaid power of attorney, who claim an equal ſhare of the ſaid eſtate by the ſaid teſtator's will), and held the ſaid eſtate by virtue thereof, till that very lately he died inſolvent.

THE ſaid William Hardy the teſtator, in his life-time, and before the making of his will, mortgaged the ſaid houſe and premiſes called the Red Cow to one Sowearſby Smith, for ſecuring the ſum of 138l. with lawful intereſt, who afterwards aſſigned over ſaid mortgage to one William Porter, of Cambridge aforeſaid, brewer, upon payment thereof,

of, who is since dead, and left one daughter, who is entitled to said mortgage-money and interest.

NOTE; It is said that John Hardy, some years ago, in a heat of passion, sold all his right, title, &c. of, in, and to the said house and premises to his sister Jane, then wife of Joseph Cook, for the sum of one guinea, which she then paid him in consideration thereof, and he accordingly executed a memorandum for that purpose on a piece of unstamped paper; but nothing further done therein to carry the same into execution.

1. Quære. WHETHER by the will of William Hardy the father his son John is not devisee, and has not a right to redeem said mortgaged house alone, and to sell and dispose thereof, or the equity of redemption, subject to said mortgage and testator's debts and funeral charges yet unpaid out of the surplus (if any remains)? and, Will not he be entitled thereto in right of himself, as Ann the widow and executrix did not sell same in her life-time, pursuant to the directions of her husband's will? if not, Who has a right to redeem and sell the same, and who must join therein, and to whom does the equity thereof belong? William the eldest son being before provided for, and therefore excluded the benefit of his father's will, by giving him 1s. only, and though he also left a son now living, and of age, Has he any thing to do therewith, as being reputed heir at law, or not?

Answer. I THINK, that Mr. Hardy and his wife have disposed of this house so very obscurely, that they have laid a foundation for very unhappy disputes amongst their children and grandchildren, which I am afraid will not be settled without a decree; for I am not able to form any sort of judgment upon this question, *viz.* Who is entitled to the equity of redemption of the house? I rather incline to think that the court may incline to make it a trust in the wife and her heirs to sell and to divide the purchase-money amongst her children as she should appoint, if not to them equally, except the eldest, who the testator declares had received his portion; for as to John's right, if the widow had in pursuance of her power charged the house with portions for the children, then John might have had

have had pretenſions to the eſtate on payment of the charges upon it. But the widow has given away the whole eſtate as if it had been her own, and given it to be ſold, and diſpoſed of the whole purchaſe-money; ſo that the eſtate cannot be properly redeemed by John, becauſe the eſtate is now properly charged with legacies: and it would be clearly contrary to the intent of the teſtator to ſuffer the heir to have it ſolely, the teſtator having given it with a deſign of having it divided amongſt the younger children, and that he ſhould be excluded. But I am not able to form an opinion where it is to go, ſo many difficulties occur in the conſtruction of the two wills.

As Ann the widow and executrix of the teſtator did not ſell the ſaid houſe, and appoint the ſurplus to be divided amongſt his children by her laſt will and teſtament, purſuant to her huſband's will, Will not the ſame be deemed as elapſed legacies for want of ſuch appointment? if not, Will the ſame be conſtrued and go according to the ſtatute of diſtributions in a courſe of adminiſtration amongſt his children (except his ſon William, who alſo claimed an equal ſhare of the ſurplus, though by his father's will he had no right)? or, In what other manner will the ſame be conſtrued as to the diſtribution in regard to the ſurplus, which muſt be what the teſtator meant by the bequeſts in his will, as the houſe then was and ſtill is in mortgage? and, Will William the ſon, or his repreſentative, be not titled thereto, or to any and what ſhare thereof, or not, he being before excluded? 2. Quære.

AS I cannot form a judgment upon the diſpoſition of this houſe, as I have ſaid above, I am not able to anſwer this queſtion: for as to the ſuppoſition of the will being void, the deviſe being lapſed, if this be ſo, then, if this houſe be freehold, it would be a reſulting truſt for the heir at law, which would be contrary to the intent, as is ſaid above: if it be leaſehold, then it would be divided amongſt all the children ratcably by the ſtatute of diſtributions, or, the childrens' children, if any of the children are dead; but Anſwer.

but then William would be entitled to a ſhare. And if it could be agreed to be ſo divided, I think it would be diſpoſed of more juſtly and reaſonably than by any other way, though poſſibly William might not be intended to take any ſhare; for William cannot be excluded from taking a real eſtate by any negative words; for unleſs it be taken away from him (in caſe it be freehold), it muſt devolve upon him as heir at law. I muſt candidly confeſs, that I am not able to form any judgment on theſe wills, as I have ſaid above; but if the court of chancery can do it, I think it will lay hold on the firſt deviſe to the wife upon truſt to ſell and diſpoſe of the ſame (that is, the money ariſing therefrom) amongſt his children at her deceaſe, according to her diſcretion. Upon theſe words the court, if ſhe has made a proper diſpoſition of it, purſuant to her power, in the opinion of the court, may diſpoſe of it as ſhe therein directs: but then the legacies are moſt of them given to grandchildren, and not to children, and that does not ſeem to have been in her power to do; ſo that ſhe does not ſeem to me to have had any regard to the power by the will that ſhe has made, but has given the eſtate as if it was her own.

If the will ſhould be held to be void, as not purſuant to her power, then the court may probably hold the deviſe of the lands by the teſtator to the wife to be ſold to be good, and that it ſhould be turned into money, and that the money ſhall be equally divided amongſt the children, ſhe not having properly diſpoſed of it; though I ſee objections againſt this and every other way that I have conſidered it.

What is ſaid above is an Anſwer alſo, as far as I am able to give one, to the Third Queſtion.

3 Quere. As ſaid Ann Hardy, the widow and executrix of the ſaid teſtator, only proved his will, and did not ſell the houſe, as ſhe was directed to do thereby; Could ſhe legally make ſuch

ſuch will as ſhe did, and give ſuch legacies thereby to her grandchildren and children or not, as ſhe had no ways performed the truſts in his will? 4. Quære.

NOTE, ALL William Hardy's children were by his ſaid wife Ann, ſo are her children as well as his.

IN caſe ſaid Ann had ſuch power to make ſuch will as aforeſaid, and Beard her executor having renounced his executorſhip to William the eldeſt ſon, could Beard convey ſaid houſe to ſaid Daniel Hunter as aforeſaid, and will the ſame be good and valid in law, or not?

As the maker of this will ſeems to have had a genius at making difficulties, ſo I think he has left it veryu btful whether the fee-ſimple was given to the wife or not; for there are no words of limitation of inheritance annexed to the deviſe, or whether only a bare power is given to her to ſell the houſe: but as ſhe was intruſted to ſell and diſpoſe of the houſe, I incline to think, that if ſhe was to grant a fee ſhe muſt have a fee granted to her; and therefore I incline to think, that ſhe had a fee-ſimple implicitly veſted in her, and that ſhe has deviſed it to mr. Beard (though this is not by any means clear): for I incline to think, that this was not a power given to her which did devolve upon her perſonal repreſentatives. If therefore mr. Beard has conveyed his intereſt to mr. Hunter, then he has conveyed a fee-ſimple eſtate to him but in truſt, and he will be obliged, I think, to convey as a court of equity ſhall direct; for if he had the fee-ſimple, his renunciation of the executorſhip did not diveſt him of ſuch fee. Anſwer.

As ſaid William and John Hardy and Ann Hunter executed ſuch power of attorney to Daniel Hunter, Beard, and Higgins, who never acted (Beard being ſince dead and Higgins his executor now living), Can Hunter and Higgins now ſell ſaid houſe by virtue of ſaid power, and divide the ſurplus according to the directions given thereby, as ſaid Jane Cook, one other of the children of the ſaid William Hardy the father, and her huſband, never executed the ſame; and will ſuch ſale be good and valid in law, or not? 5. Quære.

IF

Anſwer. If William had the fee-ſimple, and he and John Hardy and Ann Hunter executed a letter of attorney to Daniel Hunter, Beard, and Higgins, jointly to ſell, and Beard is dead, then the two ſurvivors, I think, cannot ſell by virtue of the power; and if they could ſell, they would be under difficulties how to divide the money; and would not, I think, be adviſed to do it without the direction of a court of equity, from the doubts and difficulties before hinted at.

6. Quære. If John Hardy has the right of redemption only of ſaid houſe by virtue of his father's will, and as the houſe is not yet ſold purſuant to ſaid power given to Hunter and others, Cannot he revoke ſaid power of attorney in writing, notwithſtanding it is made irrevocable, and by that means, or how otherwiſe, get into poſſeſſion of ſaid houſe, and hold the ſame, and receive the rents and profits thereof, till a purchaſer can be met with, and muſt be accountable for the ſurplus or not? and alſo, May not he call ſaid Hunter to an account for the rents and profits thereof; and how muſt the ſame be applied and diſpoſed of, when ſo received of ſaid Hunter?

Anſwer. I THINK, that if John had a title to this equity of redemption, that then he has power to revoke the letter of attorney made by him to ſell the eſtate, in caſe the power is not executed, though it is made irrevocable, for a letter of attorney cannot regularly be made to be irrevocable; but it is clear that he has no legal title to the eſtate, and I incline to think that he has no equitable title to the ſame: ſo that he has not, I think, any means to get at this eſtate by any legal courſe, but by the aid of a court of equity only; where, if a bill is brought, it will be determined whether he had or has not a right to this equity of redemption. If he is intitled to the houſe, that is to the redemption of it, then he will not be accountable for the rents and profits of it, but Hunter will, I think, to him: but the right to the profits, or the application thereof, will depend on the right to the equity of redemption of the eſtate, which I

do

do not pretend to determine upon the circumſtances of this Caſe.

In caſe ſaid John Hardy agreed to ſell all his right, title, of, in, and to ſaid houſe and premiſes to his ſiſter Jane Cook for a guinea in manner aforeſaid, Will ſuch contract or agreement, as it was not for a valuable conſideration *bonâ fide* paid, but in a heat of paſſion occaſioned by his relations ſo many years ago, be binding in law or equity? and, Can it thereby exclude him of all his right to his father's will, or not? if it ſhould, Can he ſtill act under his father's will, and ſell ſaid houſe and pay off ſaid mortgage, and afterwards retain to himſelf all ſuch coſts and charges as he ſhall neceſſarily pay, expend, or be put to in or about executing the truſts in the teſtator's will? and, Will ſaid Jane Cook be afterwards intitled to her ſhare, or any and what part of the ſurplus money, if any ſhould remain after paying off ſaid mortgage and all ſuch coſts and charges as aforeſaid? 7. Quære.

If John Hardy was intitled and did agree to ſell his intereſt in this houſe and premiſes to his ſiſter Jane Cook for one guinea, and it was reduced into writing, yet this being an agreement that cannot be carried into execution but by the aid of a court of equity, as it is much beneath the value of the intereſt intended to be conveyed, a court of equity will not, I think, carry it into execution againſt him, and deprive him of his right under his father's will; but I do not ſee that he has any right to act under his father's will, and ſell the houſe and pay off the mortgage, and afterwards retain to himſelf all ſuch coſts and charges as he ſhould be put unto in the execution of the truſts of that will. If the contract above is ſet aſide, then I do not ſee upon what ground Jane Cook can have any pretenſion to the ſurplus. Anſwer.

Ann Hardy by her will gives this eſtate as aforeſaid to her truſty friend Jeremiah Beard, in truſt to ſell and pay thereout to her grandſon Samuel Hardy 10l. to her 8. Quære.

her grand-daughter Ann Hunter 10l. and to her grand-daughter Mary Hunter 10l. and to her ſons William Hardy and John Hardy five guineas each; and then directs the ſaid Jeremiah Beard to diſpoſe of the remainder between Ann Hunter and Jane Cook and all her grandchildren (except theſe three above, to whom ſhe reſpectively gave the ſpecific legacy of 10l. each); Will the ſaid grandchildren come into the ſpecific legacies, or any and what part thereof? if not, Will the ſaid Ann Hunter and Jane Cook come into any and what ſhares of the money this meſſuage or inn is ſold for, they being the children of the ſaid William and Ann Hardy, and to have the reſidue as aforeſaid by their ſaid mother's will with all the other grandchildren? and, Can the ſaid other grandchildren come into any part of the ſaid reſidue, or not?

Anſwer. THIS queſtion is endeavoured to be anſwered above, *viz.* That as the truſt ſeems to have been intentionally for the benefit of her children only, her grandchildren ſhould have no ſhare; and as the will was not made in purſuance of her power, and as ſhe has not purſued her power, and has given the whole eſtate, that is the produce of it, that therefore the will would not prevail.

BUT I never gave any opinion with more diffidence than this. As the principal of the mortgage on this houſe is 138l. and as it is an houſe only, and only rented at 15l. *per ann.* if the parties intereſted ſhall think proper to litigate the title, I think that more than its value will be exhauſted in the diſpute.

Lincoln's Inn,
May 15. R. WILBRAHAM.

SIR

CASE. 5.

A teſtator bequeaths to his ſiſter all his money placed out at intereſt on any fund, upon truſt to pay certain legacies in his will mentioned; and the teſtator appoints his ſon executor of his will.—SIR ROBERT RAYMOND'S OPINION, Whether the ſiſter, in caſe the funds appropriated to the payment of the legacies be more than adequate to them, will be a truſtee as to the reſidue?

SIR WILLIAM MASSINGBERD, bart. by his will, deviſes to ſeveral perſons ſeveral ſums, amounting in the whole to 4290l.

One hundred pounds, part of the ſaid ſum, is deviſed to Margaret Willymott, wife of Thomas Willymott; which ſaid Thomas Willymott was indebted to the ſaid ſir William, at the time of making the ſaid will; and alſo at ſir William's death in 100l. principal money, due upon bond, beſides intereſt.

SIR WILLIAM was alſo, at the time of making of the ſaid will, and at the day of his death, poſſeſſed of and entitled unto one annuity of 200l. *per annum*, for the term of nine-ninety years, payable at the receipt of his majeſty's exchequer at Weſtminſter quarterly, *viz.* at Lady-Day, Nativity of St. John, Michaelmas, and Chriſtmas.

SIR WILLIAM by his ſaid will deviſes the ſaid exchequer annuity to his daughter Barbara in theſe words: "I give unto my ſaid daughter the exchequer annuity of "200l. *per annum* for ninety-nine years, purchaſed by me "of the lord Teviott." Then he goes on and ſays, "*Item*, I give to my ſiſter Maſſingberd all and every of "the ſum and ſums of money placed out at intereſt, "upon bond or otherways, in my own name, or in the "name and names of any perſon or perſons for my uſe, "in the Eaſt-India Company, or the South-Sea Com-"pany, or in the Sword-blade Company, or in the Bank "of England, or in any ſtate lottery or lotteries, fund or "funds, and in all and every of them, or elſewhere, upon "this truſt and confidence, that ſhe my ſaid ſiſter, whom "I do hereby authoriſe and impower to do the ſame, ſhall "and do, within ſix calendar months next after my de-"ceaſe, pay or cauſe to be paid all and every of the above-"ſaid ſums (amounting in the whole to 4290l.) to the ſe-"veral and reſpective perſons, and according to the reſ-"pective proportions above-mentioned; and I believe the "money ſo placed out will be ſufficient for that purpoſe; "but in caſe it ſhould fall ſhort, contrary to my expecta-"tion, my will is, that proportionable deductions be made "and allowed by all and every of the perſons therein con-"cerned, out of the reſpective ſums given to each of them "as aforeſaid."

SIR WILLIAM at the day of his death had no money placed out at intereſt upon bond or otherways, or in any

fund or lottery, except only in the East-India Company and the South-Sea Company, and ſecured by penal bonds of the ſaid Company, which may amount to more than the ſaid ſum of 4290l. to be paid to the ſaid legatees, and except the ſaid exchequer annuity of 200l. and 40l. lent to one Baldwin, for re-payment of which Baldwin gave directions to his tenant to pay to ſir William the rent of his land till the ſaid ſum ſhould be paid, but without intereſt.

SIR WILLIAM alſo deviſed by the ſaid will to his ſaid ſiſter, a freehold eſtate of a conſiderable yearly value, with remainder over in tail to his daughter, remainder over.

SIR WILLIAM makes his ſon and heir, the preſent ſir William, executor of his ſaid will; and afterwards, the 26th of March laſt, dies.

THE original will, all writ by ſir William's own hand, and atteſted by three witneſſes, according to the ſtatute, was left by the ſaid ſir William the teſtator, who lived in Lincolnſhire, in his ſaid ſiſters hands, who lived in town; and the ſame is now in her hands.

1 Quære. Is mrs. Maſſingberd, in caſe there be an overplus of the ſaid East-India bonds and South-Sea bonds more than ſufficient to pay the ſaid ſum of 4290l. entitled to the reſidue of the ſums deviſed to her as aforeſaid, to her own uſe? or, Shall ſhe be deemed to be a truſtee for ſuch overplus for the ſaid ſir William Maſſingberd the executor?

2 Quære. MAY the legacy of 100l. deviſed to Margaret Willymott, as this Caſe ſtands, in equity, be ſtopped and retained in mrs. Maſſingberd's hands, towards ſatisfaction of the ſaid debt of 100l. due to ſir William the teſtator? and admitting it may, May mrs. Maſſingberd, notwithſtanding that if ſhe be ſo inclined, and notwithſtanding that ſhe may be deemed to be a truſtee for the overplus, ſafely pay to the ſaid Margaret Willymott's huſband the ſaid legacy of 100l. and be indemnified againſt ſir William the executor?

3 Quære. SHALL the 50l. due for one quarter's arrears of the ſaid annuity of 200l. ended at Lady-Day, laſt paſt, belong to ſir William the executor, as a thing veſted in ſir William the teſtator at his death, and not diſpoſed of, or to mrs. Maſſingberd the ſiſter, by virtue of any of the ample and general words in the ſaid deviſe to her of all and every the ſum and ſums of money, &c.? and, Shall the ſaid 40l. lent

lent to Baldwin, or the money received or to be received of Baldwin's tenant, though no intereſt is expreſſed, belong to the ſaid mrs. Maſſingberd, by virtue of the words in the ſaid deviſe by bond or otherwiſe, or to the ſaid ſir William the executor?

4. Quære.

SIR WILLIAM being the executor, and alſo heir of ſir William his father, Will it not be prudent for mrs. Maſſingberd in reſpect of herſelf, and incumbent upon her in reſpect of the remainder-men, to deliver the ſaid will to ſir William before witneſſes, and to procure one or more copies of the ſame to be made, and to be faithfully collated by the original, by ſome perſon or perſons, to be kept ſafely by her? and in caſe ſir William ſhould neglect in a reaſonable time to confirm the will, Will ſhe not be inexcuſable to thoſe in remainder, unleſs ſhe endeavours to have the ſaid will eſtabliſhed in a court of chancery? or, Whether, ſhe being in poſſeſſion and receipt of the rents without an actual entry, it may not be proper to ſurrender the eſtate to her in remainder in tail, and to have a fine with Proclamations levied, the uſes to be declared by deed, as in the will?

Anſwer to Firſt Quære.

SINCE the money due on the Eaſt-India bonds and South-Sea bonds are deviſed to mrs. Maſſingberd only upon truſt for the payment of 4290l. I am of opinion, that if there ſhould be an overplus more than ſufficient to pay the 4290l. ſhe will not be entitled to ſuch overplus for her own uſe, but that it will belong by way of remainder to ſir William, as executor to his father.

Anſwer to Second Quære.

IF mr. Willymott and his wife ſhould bring a bill in equity for the recovery of her legacy of 100l. mrs. Maſſingberd could not inſiſt on ſtopping it for the 100l. debt; becauſe ſtoppage is no payment: and yet on a bill brought by mrs. Maſſingberd, ſetting out the debt and legacies and praying an account, I conceive, on ſuch a bill there would be a decree to ſet off the debt againſt the legacy. As the 100l. debt ought to be paid by mr. Willymott, as well as the 100l. legacy ought to be paid to him, he being entitled thereto, though given to his wife, I

think it not adviſeable for mrs. Maſſingberd to pay the 100l. legacy without ſecuring the payment by mr. Willymott of the 100l. debt.

Anſwer to Third Quære. THOUGH theſe ſums ſeem to me to paſs to mrs Maſſingberd by the general deviſe to her, yet that being only on a truſt, if there ſhall be a ſurplus after the truſt performed, as I ſaid before, ſir William as executor, I apprehend, will be intitled to it, and by conſequence to theſe ſums as part of the ſurplus, if they ſhall be ſuch.

Anſwer to Fourth Quære. A REAL eſtate being deviſed by this will from ſir William, the heir at law, great care ought to be taken of it, for the benefit of the deviſees; and therefore I ſhould not think it by any means adviſeable for mrs. Maſſingberd to deliver the original will to ſir William till, either he has confirmed the ſeveral deviſes in it, or that the will is proved in chancery: for which purpoſe, I think, the perſon next in remainder expectant on the eſtate of mrs. Maſſingberd may, together with mrs. Maſſingberd, bring a bill in chancery againſt ſir William, as heir at law to his father, to have the will proved. This need not be done in an adverſary way, but in an amicable manner; and is very neceſſary to be done, unleſs ſir William will, by proper conveyances, join in a ſettlement of the eſtate to the uſes in the will. The conveyance by fine, mentioned in the *Quære*, may be proper, if ſir William joins in it; but if he does not join in it, and the will ſhould be loſt, it would not have the intended effect.

Lincoln's-Inn, ROB. RAYMOND.
May 26, 1719

T. B.

CASE 6.

A teſtator deviſes, for the payment of his debts, certain freehold and leaſehold lands unto two, whom he afterwards appoints his executors; and he gives the overplus, after performance of the truſts of his will, to ſuch perſon as a manor, which he afterwards deviſes to *S. B.* for life, remainder to his firſt and other ſons in tail male, ſhould belong. *S. B.* having a ſon of the age of twenty-one—The OPINION of Mr. EMERY, By what means the father and the ſon might obtain the abſolute property of the truſt eſtates?

T. B. (int. al.) diſpoſes as follows in his will: "And "for and towards payment and ſatisfaction of all my "juſt and proper debts, and the payment of perſonal "legacies hereby given, and not charged upon any part "of my eſtate, and for diſcharge of my funeral expences, "I do give and bequeath unto *M. J. T. T. H. G.* and "*J. H.* their heirs and aſſigns, all my lands, tenements, "and hereditaments whatſoever, &c. in *H.* and alſo all "my goods, chattels, leaſes for years, and perſonal eſtate "whatſoever; and do make and conſtitute *them* execu-"tors; and give to each of them 50l. beſides their rea-"ſonable charges and expences in relation to the execu-"tion of the truſt in them hereby repoſed; and what over-"plus ſhall remain after performance thereof, I give to "ſuch perſon for the time as my manor of Linden, ſhall "according to the limitations thereof herein after-men-"tioned, belong; and particularly my deſire is, that my "leaſehold lands held of the dean and chapter of *L.* may "be reſerved and ſettled to go with my ſaid manor of Lin-"den, ſo far as by law it can." Then he gives the manor of Linden, &c. to *S. B.* for life; remainder to his firſt ſon, and the heirs of his body; with remainders over.

Quære.

S. B. the firſt ſon of *T. B.* is now of age, and father and ſon are deſirous to cut of the entail: How and in what manner ought the ſame to be done, both with reſpect to the eſtate at *L.* and at *H.*?

Anſwer.

AS to the eſtate at *L.* *S. B.* being tenant of the freehold in poſſeſſion, a recovery may be ſuffered thereof in common form, by bringing the *præcipe* againſt *S. B.*; he to vouch *T. B.* the ſon; and he to vouch over the common vouchee.

As to the eſtate at *H.* I take it is deviſed to the truſtees in fee-ſimple, upon truſt to ſell the ſame; and out of the monies ariſing by the ſale thereof to do what the will directs; and all the debts, whereſoever charged, to be paid out of it, for ſo much as the perſonal eſtate ſhall prove deficient;

deficient: and as to the *overplus, i. e.* what ſhall remain of the purchaſe-money after the ſaid legacies and debts diſcharged, it ſeems to be the teſtator's meaning, that the ſame ſhould be paid over to the perſon who, according to the limitations of the *L.* eſtate, ſhould, at the time of all the ſaid debts and legacies being diſcharged, be in poſſeſſion of the *L.* eſtate; ſo that in this view no recovery would be neceſſary. But it would be prudent for the ſaid *S. B.* to diſcharge the legacies, &c. as ſoon as may be, that the overplus may become payable while the *L.* eſtate belongs to him. But as a doubt may ariſe, whether the teſtator did not intend that ſo much of the eſtate *at H. as is not neceſſary to be ſold to raiſe the money ſufficient to pay the legacies, &c. or the overplus money ariſing by ſuch ſale*, and to be laid out in lands, *ſhould be ſettled according to ſuch limitations* as the eſtate at *L.*; and *S. B.* and his ſon cannot regularly ſuffer a recovery of that eſtate while it is in the truſtees, or the truſts not fully performed; it will be the ſafeſt for *S. B.* and his ſon to *finiſh the truſt*, by paying off, &c. *and to take a conveyance from the truſtees*, and then ſuffer a recovery of the eſtate at *H.* in the ſame manner as at *L.* If any difficulty ſhould be in actually paying off the ſaid debts or legacies, yet the creditors or legatees *(upon receiving other ſufficient ſecurity)* may releaſe their claims and demands; and, if required, the *ſame* eſtate may be again mortgaged to them (after the recovery) by *S. B.* and his ſon; for then they will ceaſe to be the debts of the teſtator, and will be re-advanced upon the freſh credit of *S. B.* and his ſon.

1742. S. EMLYN.

A MARRIAGE

CASE 7.

A tenant for life who has granted annuities out of his eſtate, and is otherwiſe in embarraſſed circumſtances, being deſirous to convey his eſtate in truſt for the benefit of his wife and children, independent of his own control—the OPINION of Mr. BOOTH upon the moſt eligible mode of effectuating ſuch purpoſe.

A MARRIAGE being intended between *A.* and *B.* the following ſettlement of leaſe and releaſe was made by *A.*

RECITING the marriage intended; in conſideration of which, as well as the portion he was to receive with *B.* he conveys to *C.* and *D.* the two truſtees named in the ſettlement, the manor of ———, &c. in truſt for *A.* until the marriage; remainder to *A.* for life; remainder to truſtees to preſerve; remainder to *B.* for life; remainder to the children of the marriage, or any one or more, as *A.* ſhould appoint: and in default of ſuch appointment, remainder to the firſt and other ſons in tail male; remainder to the daughters as tenants in common; remainder to the right heirs of *A.*

A COVENANT to pay 18,000l. into the hands of the truſtees, upon truſt to lay out and inveſt the ſame, either together or in parcels, with the approbation of *A.* and *B.* to be ſignified in writing, in the purchaſe of freehold lands and tenements, to be ſettled to the ſame uſes as before-mentioned. Power for the parties to grant leaſes.

THIS marriage took effect, and the 18000l. was paid into the hands of the truſtees, who have ſince laid out the ſame, with the approbation of *A.* and *B.* in the purchaſe of freehold lands, &c. which have been ſettled accordingly.

A. has already granted an annuity of 100l. to *F.* to be iſſuing out of the manor ſettled during the joint lives of *A.* and *F.*

A. is very conſiderably indebted to *G.* which not being able to pay, he has agreed to grant *G.* an annuity for his *A.*'s life, to be payable out of his life-eſtate in theſe ſettled premiſes; and as he has already outrun a very conſiderable eſtate, he is deſirous of diveſting himſelf of all further power of receiving the rents of theſe eſtates, and that the ſame ſhall be applied for the maintenance and ſupport of his wife and three children. For theſe purpoſes he is deſirous that his *A.*'s life-eſtate ſhall be veſted in a truſtee for paying the annuity of 100l. granted to *F.* in the firſt place, and afterwards for paying an annuity of 350l to *G.* and the remainder of the rents to be paid to *B.* his wife, notwithſtanding her coverture, for the maintenance of herſelf and family, and for the education of her children; and it is intended, that the truſtee ſhall be put into poſ-

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ſeſſion of the eſtates to receive the rents during *A.*'s life, for the purpoſes aforeſaid.

All *A.*'s debt, except *G.*'s are diſcharged, and he is at this time quite free from any.

1. Quere. PLEASE to adviſe and plan, In what manner *A.*'s life eſtates may be effectually conveyed and made over to a truſtee, for the purpoſes aforeſaid?

Anſwer, BY indenture between *A.* and *B.* his wife of the one part and *C.* of the other part, recite, that the manor, meſſuages, &c. hereinafter-mentioned to be hereby granted and demiſed, are charged with, and ſubject and liable to, the payment of two annual rents-charge or yearly ſums; the one of 100l. payable to *F.* for the joint lives of the ſaid *A.* and *F.* by equal payments, by virtue of a certain indenture bearing date, &c. and made &c.; and the other of 35cl. payable to *G.* for the life of the ſaid *A.* by equal payments, by virtue of a certain indenture bearing date, &c. and made between, &c. Recite that *A.* is deſirous to ſecure a proviſion for the maintenance of the ſaid *B.* his wife and his family, and for the education of his children; and for that purpoſe hath agreed to veſt all the ſaid manor, &c. in the ſaid *C.* (ſubject to the uſual outgoings for payment of taxes and repairs, and to the payment of the ſaid rent-charges) in truſt to pay the ſurplus of the rents to the proper hands of the ſaid *B.* for her ſeparate uſe and diſpoſal, as if ſhe was ſole and unmarried. Witneſs, that for effectuating the purpoſe and agreement aforeſaid, and in conſideration of five ſhillings, *A.* grants, &c. to *C.* all, &c. to hold to *C.* his executors, &c. for ninety-nine years, if *A.* and *B.* ſhall jointly ſo long live, on the following truſts, *viz.* to make and pay all reaſonable allowances for uſual outgoings, and payment of taxes and repairs, and for ſalaries and rewards of ſtewards, agents, bailiffs, and receivers, and all other ordinary and uſual charges incident to the ſaid premiſes, and then to pay the rents-charge; and

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ſubject as aforeſaid to pay the ſurplus to the proper hands of *B.* or as ſhe ſhall appoint, for her ſeparate uſe, free from the control, debts, and engagements of her huſband.

PROVISO, that this preſent indenture ſhall not ſuſpend, make void, or invalidate, any power or powers whereby the ſaid *A.* is enabled to make leaſes of the premiſes; but that he may with concurrence of truſtees; and that fines and rents reſerved ſhall be paid and accounted for to the truſtees on the truſts aforeſaid.

COVENANT from *A.* for quiet enjoyment on the truſts aforeſaid, and that he will not do any act whereby the execution of the truſts may be obſtructed, but on requeſt do any act for better enabling them to execute the ſame. *Proviſo* for the indemnity of the truſtees.

AFTER the annuity to *G.* is fully ſecured to him, as he is a friend to *A.*'s family, and in regard to their diſtreſſes *G.* is deſirous his annuity ſhould be made over in ſuch manner that *B.* may receive the ſame independent of *G.* for the better ſupport of herſelf and family during *A.*'s life, but in ſuch manner that *A.* may know nothing of the matter;

BE pleaſed therefore to adviſe likewiſe, In what manner this may be done, ſo as to ſecure the ſame effectually to *B.* independent of *G.*? 2. Quære.

BY indenture tripartite, between *G.* of the firſt part, *B.* the wife of *A.* of the ſecond part, and *C.* of the third part, recite the grant of the rent-charge to the ſaid *G.*; and that *G.* having a great friendſhip for *A.* and his family, and compaſſionating their diſtreſſed circumſtances, hath agreed, for the better ſupport of the ſaid *B.* and her family, to pay the ſaid rent-charge to the proper hands of the ſaid *B.* for her ſeparate uſe and diſpoſal, as if ſhe was ſole and unmarried. Witneſs, that for effectuating the purpoſe aforeſaid, let *G.* covenant with *C.* that he *G.* will ſtand ſeiſed of the ſaid rent-charge, in truſt to pay the ſame to the proper hands of *B.* for her ſeparate uſe; and in caſe Anſwer.

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ſhe ſhall depart this life before the ſaid rent-charge be determined, to pay the ſame to ſuch uſes as ſhe ſhall appoint (except for the benefit of *A.* her huſband); and in default of appointment, in truſt for *G.*; and that he the ſaid *G.* and his heirs ſhall and will pay and apply the ſame rent-charge accordingly.

INDENTURES to the purport aforeſaid will be effectual.

1760. *J. B.*

CASE. 8.

28. April, 1743.

A teſtator deviſed all his lands in *M* to truſtees, and the ſurvivor of them, and his heirs, in truſt,

SIR CHARLES LLOYD, baronet, made his will, duly executed, and thereby deviſed all his lands in Montgomery unto two truſtees, and the ſurvivor of them, and his heirs, in truſt, by ſale or mortgage, or otherwiſe, to raiſe money to pay his debts; and ſubject thereto, out of the profits, to pay his daughter Victoria 150l. a-year until his debts were paid: and ſubject and chargeable as aforeſaid, he deviſed and gave all his lands and hereditaments

by ſale, mortgage, or otherwiſe, to pay the teſtator's debts; and ſubject thereto, and to the further charges therein mentioned, he deviſed all his lands to his daughter *V.* for life, and after her deceaſe, to ſuch huſband as ſhe ſhould marry, ſo much as ſhould be anſwerable to what he ſhould ſettle on her and her iſſue for his life; remainder to the firſt and other ſons of the ſaid *V.* ſucceſſively, in tail; remainder to her daughters in tail; remainder over. The truſtees, upon the teſtator's death, not chooſing to act, conveyed to other truſtees upon the ſame truſts, in purſuance of a decree in chancery. And theſe truſtees afterwards, by indentures of leaſe and releaſe, reciting that they had diſcharged all the teſtator's debts then diſcovered, but that it was uncertain whether they had been all delivered in, convey the truſt eſtate to the ſaid *V.* and her heirs, to the uſe of themſelves for four hundred years, upon truſt to raiſe money for paying the debts and annuities of the teſtator, and indemnifying themſelves; and ſubject thereto, to the ſeveral uſes mentioned in the words of the will of the ſaid teſtator; with a power for *V.* to charge the premiſes, purſuantly to the ſame will, with portions for younger children. *V.* afterwards conveys the premiſes by leaſe and releaſe to *A. L.* who afterwards demiſes the ſame for five hundred years to the intended huſband of *V.* for ſecuring 10,000l. part of the conſideration-money to him as her marriage-portion. The huſband afterwards, upon his marriage with *V.* conveys his own eſtate to uſes, in ſtrict ſettlement, for the benefit of *V.* and her iſſue by him, in lieu of the proviſion intended them by the teſtatator's will.—The ſeveral OPINIONS of Mr. FILMER, Mr. RIVETT, Mr. FAZAKERLEY, Mr. WILBRAHAM, and Mr BOOTH, Whether the truſtees were guilty of a breach of truſt in the conveyance made by them to *V.*? and, Whether *V.* and her huſband could by any means make a good title to *A. L.* the purchaſer?

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ments to his daughter Victoria for life; and after her death, to ſuch huſband as ſhe ſhould marry, ſo much as ſhould be anſwerable to what he ſhould ſettle upon marriage on her and her iſſue, for his life; remainder to the firſt and other ſons of the ſaid Victoria in tail general; remainder to her daughters in tail general; with power to charge the premiſes with portions for younger children, not exceeding * . And he gave three annuities to three people for their lives, chargeable on the ſaid eſtates. And ſubject as aforeſaid he gave the remainder of his real eſtate, on failure of iſſue male of his daughter, unto † ; and made his daughter and ſir H. Edwards executors; and gave his daughter all his perſonal eſtate.

By indentures of leaſe and releaſe, the two truſtees named in the will not caring to act, did, in purſuance of a decree of the court of chancery, convey all the premiſes unto, and to the uſe of, Francis Leighton and Joſeph Aſhton, and their heirs, upon the truſts and for the purpoſes mentioned in the will. And for the more effectual conveying the ſaid truſt eſtate, at the next grand ſeſſions, in purſuance of a ſubſequent order, *the two truſtees in the will* levied a fine, which was declared to enure to the new truſtees, and their heirs, upon the like truſts. 25. and 26. April, 1744.

By indentures of leaſe and releaſe, after reciting two mortgages which had been made for two terms of one thouſand years, and five hundred years, the firſt by ſir Charles Lloyd in his life-time to Edward Jordan, eſq. for 3000l. and the other by the ſaid Francis Leighton and Joſeph Aſhton to Orlando Bridgman, eſq. and Hugh Briggs, for raiſing 3500l. with which all the ſaid debts of the ſaid ſir Charles Lloyd then appearing had been paid or ſatisfied, and that the ſaid Victoria had requeſted the ſaid truſtees to convey and ſettle all the eſtates to the ſaid Victoria according to the ſaid will, and for the other purpoſes therein mentioned; but it being uncertain whether all the debts of the ſaid ſir Charles had then been diſcovered, the ſaid truſtees did convey all the premiſes unto the ſaid Victoria Lloyd, and her heirs, to the uſe of the ſaid truſtees for four hundred years, upon truſt to raiſe money ſufficient to pay the debts and annuities of ſir Charles Lloyd, and to indemnify the truſtees from all coſts and damages they ſhould at any time thereafter be put to by reaſon of their executing the indenture of mortgage 26. and 27. June, 1745.

* A blank in the will. † A blank in the will.

therein

therein recited, or of that indenture; and after the expiration of the ſaid term, *to the ſeveral uſes mentioned in the words of the will of the ſaid ſir Charles Lloyd*, with a power for Victoria, whether ſole or covert, to charge all or any of the premiſes, purſuant to ſir Charles Lloyd's will, with any ſum not exceeding 3000l. for younger childrens' portions.

22. Mar. 1747. By indorſement on the laſt indenture it is declared by Victoria, Ann Leighton, Francis Leighton, and Joſeph Aſhton, that the ſaid term of four hundred years ſhould remain veſted in the truſtees, as well upon the truſts in the laſt indenture as upon truſt, at the death of the ſaid Victoria, to raiſe 1500l. with intereſt at four and a half *per cent.* and pay the ſame to ſuch perſons as the ſaid Victoria ſhould appoint.

11. and 12. March, 1747. By indentures of leaſe and releaſe and fine, reciting, that the ſaid Victoria Lloyd was indebted to the ſaid Ann Leighton in 2500l. and that the ſaid eſtate was by the ſaid ſir Charles Lloyd's will ſubject to three annuities of 25l. *per annum* for life, and alſo charged with another annuity of 50l. *per annum*, granted ſince his death by the ſaid Victoria Lloyd to her ſteward for life, it is witneſſed, that in conſideration of 10,000l. paid down, and of 1500l. agreed to be paid by the ſaid Ann Leighton at the death of the ſaid Victoria, and of the ſaid debts of 3000l. and 3500l. which with intereſt from thence were to be paid by the ſaid Ann Leighton, and of the ſaid four annuities alſo to be paid by her, and of her delivering up the ſaid bond for 2500l. to be cancelled, ſhe the ſaid Victoria Lloyd did convey the premiſes to the ſaid Ann Leighton and her heirs, with the privity and conſent of Edward Kynaſton, whom the ſaid Victoria had then agreed to marry, and who choſe rather to have 10,000l. than an eſtate ſo much incumbered; but is ſilent as to the ſaid 3000l. ſecured to be raiſed by the ſaid indenture of 27th June 1745.

14 Mar. 1747. By indenture tripartite between the ſaid Ann Leighton of the firſt part, the ſaid Victoria Lloyd of the ſecond part, and the ſaid Edward Kynaſton of the third part, after reciting the conveyance to Ann Leighton, and that a marriage was intended between the ſaid Edward Kynaſton and Victoria Lloyd, and that he was to have 10,000l. paid, or ſecured to be paid, to him, as her marriage-portion, and that it was agreed by all the parties that the ſaid Ann Leighton ſhould mortgage the purchaſed eſtate to him for ſecuring the ſaid 10,000l. and intereſt, the ſaid Ann

Leighton

Leighton did demiſe the ſame premiſes to mr. Kynaſton for five hundred years, ſubject to a redemption upon payment of 10,000l. and intereſt.

By indentures of leaſe and releaſe the ſaid Edward Kynaſton, in conſideration of the ſaid intended marriage, and of the ſaid 10,000l. which he received with her as a portion, ſettled an eſtate in Shropſhire, of much greater value than ſir Charles Lloyd's, on himſelf for life, remainder to truſtees to preſerve, &c. then for ſecuring to the ſaid Victoria a rent-charge of 700l. a-year for her life for her jointure; remainder to the firſt and other ſons of the marriage in tail male, with proviſion for raiſing portions and maintenance for the younger daughters and ſons of the marriage. And after reciting, that pending the treaty for the ſaid marriage the ſaid Victoria had, with the privity of Edward Kynaſton, ſold and conveyed the ſaid eſtate to Ann Leighton for 10,000l. over and above and ſubject to the aforeſaid debts and incumbrances, and to the ſaid 1500l. the ſaid 10,000l. being the portion of the ſaid Victoria, which mr. Kynaſton choſe to have in money inſtead of her real eſtate, in regard he did not eſteem the value thereof, ſubject to the charges thereon, to amount 10,000l. *it was thereby agreed, that the ſettlement and proviſion thereby made* on the eſtate of the ſaid Edward Kynaſton for the iſſue of the marriage, ſhould be in *lieu and ſatisfaction for all claims which they reſpectively might have out of the real eſtate of the ſaid ſir Charles Lloyd by virtue of his will*; and if any ſon or ſons of the marriage, entitled to mr. Kynaſton's eſtate, or to any portions out of the ſame, by virtue of or under that ſettlement, reſpectively, when of age, ſhould not make and execute ſuch acts, deeds, conveyances, or aſſurances, as were requiſite and neceſſary for the ratification and confirmation of the ſale and conveyance of ſir Charles Lloyd's eſtate to the ſaid Ann Leighton, her heirs or aſſigns, and for releaſing and extinguiſhing all their right, intereſt, or claim, of, in, and to the ſame reſpectively, then all the limitations, portions, and proviſions, for them ſecured by the marriage-ſettlement, ſhould be void. And alſo a *proviſo*, by mortgage or ſale, of a term of five hundred years in the ſettled eſtate, to raiſe money to indemnify mrs. Leighton on account of thoſe claims. 14. and 15. March, 1747.

There is no iſſue of Victoria by mr. Kynaſton, and Victoria is about thirty years of age.

Mr. Filmer's Opinion.

1ſt. I AM of opinion, that the legal eſtate deviſed to the truſtees in ſir Charles Lloyd's will was well conveyed to the new truſtees by the leaſe and releaſe and fine in 1744. *Vide* Vick *v.* Edwards, 3. P. Wms. 372. But the eſtate being deviſed to the truſtees and their heirs by ſale or mortgage to raiſe money to pay debts, I apprehend the legal eſtate was in the truſtees, and that the ſubſequent limitations in the will are equitable eſtates; and therefore if a bill had been brought for ſettling the eſtates to the uſes of the will, a court of equity would have ordered that there ſhould be truſtees to preſerve the contingent remainders: ſo that the new truſtees not having conveyed the legal eſtate according to the intention of the teſtator, and as the court would have ordered them, I do not think it ſafe for a purchaſer to purchaſe under this title.

28*th May*, 1754.

2d. This proviſo probably may ſecure a purchaſer of ſir Charles Lloyd's eſtate againſt any claim to be made by any of the ſons or daughters of Victoria by mr. Kynaſton, but it will not affect any child ſhe may have by another huſband; nor does this ſettlement, in my apprehenſion, in any ways alter the conſtruction of the limitation in ſir Charles Lloyd's will; therefore I ſee no reaſon to alter what I have ſaid concerning the title.

Mr Rivett's Opinion.

I APPREHEND, that by the firſt deviſe in ſir Charles Lloyd's will only the freehold paſſed to the truſtees, and that the inheritance did not veſt in either of them, but remained in abeyance: and after payment of the teſtator's debts, and ſubject thereto, and chargeable with ſome ſmall annuities, the legal eſtate by the next deviſe veſted in the teſtator's daughter Victoria Lloyd; and that when the debts were ſatisfied, there needed no conveyance from the truſtees, for their eſtate thereupon deveſted, and the whole

intereſt

intereſt in the premiſes was executed in the ſaid Victoria Lloyd: and as the teſtator made no diſpoſition of the fee, the ſame devolved on his daughter; and there being no limitation between that and the freehold firſt given to her but what were contingent, I conceive ſhe might well deſtroy them all by the fine, and ſo acquire an abſolute eſtate in fee: wherefore I think he had a good title.

29th May, 1754.

Mr Fazakerley's Opinion.

I SUPPOSE the uſe was executed in the truſtees; and if ſo, I am of opinion, that the truſtees were as much intruſted to ſupport the contingent remainders as for the benefit of any truſt in the will; and therefore I am of opinion, that the truſtees, by putting it in the daughter's power to defeat the contingent remainders, are anſwerable for a breach of truſt for the conſequence which has happened by the daughter's barring the contingent remainders; and if the purchaſer had notice of the will, I think the daughter's iſſue may be relieved againſt the purchaſe: but if no notice of the will, the purchaſer will hold his purchaſe: but no perſon beſides the daughter's iſſue can impeach the purchaſe, or complain of a breach of truſt. Sheph. Touchſt. 503.

6th June, 1754.

Mr Welbraham's Opinion.

AS to the firſt objection, though an eſtate in fee did not paſs to the truſtees, but the fee continued in abeyance, it being contingent in whom it would veſt; yet as they conveyed the eſtate to mr. Leighton and mr. Aſhton, two other truſtees, by fine, I think, that as one of them muſt inevitably happen to ſurvive, the fee is conveyed by eſtoppel. As to the ſecond objection, I think, that though the truſtees did convey to mrs. Kynaſton the eſtate to the ſeveral uſes mentioned in the will, yet this, I think, might be looked upon as a breach of truſt, becauſe it had a tendency

dency to the deſtroying the contingent remainders created by the will of ſir Charles Lloyd: for ſo long as the whole fee-ſimple remained in truſtees, a court of equity would not ſuffer contingent remainders to be deſtroyed, in regard that the deſtruction of them depends upon mere legal principles, *viz.* that they muſt leave a particular eſtate of freehold to ſupport them. And if the truſtees had brought a bill to have had the truſts of ſir Charles Lloyd's will carried into execution, I think, that the court of chancery would have directed a ſettlement to have been made, and would have interpoſed truſtees to preſerve contingent remainders. And though the truſtees in this caſe were not explicitly truſtees to preſerve contingent remainders yet they are ſo by implication or conſtruction of a court of equity. But as theſe truſtees, by their joining in this conveyance, did an act which was probably for the benefit of his daughter and her iſſue by that marriage, and as the truſtees had no expreſs or declared truſt to this purpoſe, I incline to think, that in caſe the iſſue of mrs. Kynaſton by her preſent huſband, or by any after-taken huſband ſhould apply to a court of equity to ſet up thoſe remainders in equity, the court would not give any relief againſt the truſtees, or againſt the purchaſer.

As to the third queſtion, I think, that if mrs. Kynaſton ſhould ſurvive her huſband, and have a ſon, he would not be deemed a poſthumous ſon under the act of 11. William. That ſtatute was intended to remedy another evil, *viz.* the inconveniency of limitations to children unborn with remainders over without any truſtee to preſerve contingent remainders; in which caſe if the feme was *enceint*, and the next in remainder entered before the birth of ſuch child, the title of him in remainder could never be impeached; becauſe the rule of law was, that a contingent remainder muſt always veſt either during the particular eſtate, or *eo inſtante* that it determines; which in that caſe

it

it did not do, but here the contingent remainders are deſtroyed, and no perſon in remainder takes who is to be deveſted by the act.

As to the fourth objection, I do not ſee how the eſtate is diſcharged from the 3000l. only. I think, that the will does not direct any ſum, and therefore that this is a fraudulent charge as againſt a purchaſer for a valuable conſideration, and therefore cannot be ſet up againſt the purchaſer in this caſe. Upon the whole, I incline to think, that a good title may be made notwithſtanding the ſeveral objections above, though it is not ſo clear as could be wiſhed: but I think, that as mr. Kynaſton ſeems to have an eſtate for life in the premiſes by the will of ſir Charles Lloyd, he having made a ſettlement on his wife adequate to her fortune, that therefore he ſhould join in a conveyance of his intereſt to a purchaſer; but I do not know that mrs. Kynaſton, or any one elſe, can do any act to ſecure the title; and I think, that if there ſhould be an application to parliament, no act could be obtained that would confirm the title, becauſe the perſons to be affected are the iſſue of mrs. Kynaſton by any after-taken huſband, who cannot have any recompence in lieu of the contingency that they are to be barred of.

Mr. Booth's Opinion.

I THINK a purchaſer cannot be ſafe under this title. My anſwers to the *Queries* are theſe:

FIRST, I am of opinion, that by the deviſe to the two truſtees and the ſurvivor of them and his heirs in truſt by ſale or mortgage to raiſe money to pay his debts, the truſtees only took the freehold for their lives, but the fee was put in abeyance by being limited to the heirs of the ſurvivor, and being ſo in (whereby it was put out of the teſtator), the teſtator could not take it up again and deviſe it by the ſubſequent words, conſequently the firſt words amount to a complete diſpoſition of the legal eſtate, and

the ſubſequent words can operate only on the equitable eſtate, and be a diſpoſition thereof. And I apprehend that the truſtees, by making a feoffment or levying a fine, might well enough bar and deſtroy the contingent remainders, and acquire ſuch a fee as to enable them to make a good title, more eſpecially if done by fine, becauſe that would make a title by eſtoppel; but it ſeems to me ſomewhat doubtful how far they have done that in the preſent caſe, as I ſhall mention in the Poſtſcript to the Second.

The two new truſtees, mr. Leighton and mr. Aſhton, ſhould have limited an eſtate to truſtees during the lifetime of Victoria, to take effect on the determination of her eſtate, in truſt to preſerve the contingent remainders from being deſtroyed; but this is upon the ſuppoſition that the ſaid two truſtees had acquired a fee by the conveyance and fine of April 1744. How far their not inſerting ſuch truſtees is a breach of truſt may be doubtful, but mr. Kynaſton and Victoria ſeem to be guilty of a breach of truſt in ſelling away the eſtate for their own advantage, and a purchaſer having notice can be in no better ſituation.

To the ſecond. The limitations in the will of ſir Charles are to the firſt and other ſons of Victoria. A woman canhave no poſthumous ſon within the meaning of the ſtatute of *W.* 3. but I think that if Victoria ſhould have a ſon by a ſecond huſband, equity would decree the eſtate to him, and the purchaſers having notice would put him on the footing of a volunteer. Even a ſon by mr. Kynaſton would be put to his election; and if he choſe to abide by his grandfather's will rather than his father's ſettlement, I do not ſee how a court of equity could avoid decreeing him the eſtate ſubject to the mortgages, becauſe ſuch ſon would have a ſpecific lien thereon.

To the Third. Younger children of mr. Kynaſton would be put to their election in equity, either to abide by the ſettlement made on their father and mother's marriage, or to claim the 3000l. under ſir Charles's will. Younger children

children by a ſubſequent marriage would be intitled to the whole 3000l. even in the hands of a purchaſer. But I muſt add, that ſo far as any mortgages have been made for raiſing money to pay the debts of ſir Charles, ſuch mortgages and the principal money due thereon are a charge on the eſtate; and ſo will any further ſum alſo be that may have been applied to pay off any further part of his debts.

It is impoſſible to adviſe a purchaſer to accept of this title. It does not appear to me that any remedy can be had in this caſe, unleſs by getting an act of parliament to confirm the title, upon ſome compenſation being thereby provided for mrs. Victoria Kynaſton's younger children by a future huſband. But I do not know whether ſuch a compenſation can be had, unleſs out of mr. Kynaſton's own eſtate. It muſt be owned to be a hard caſe on mr. Kynaſton; but as he has taken 10,000l. out of this eſtate with full notice, he may be probably adviſed to conſent to ſubject his own eſtate to this compenſation.

4th June 1754.

P. S. It may deſerve to be conſidered how far the leaſe and releaſe of the 25th and 26th of April 1744, and the ſubſequent fine operated to deſtroy the contingent remainders in fee to the ſurvivor of the two firſt truſtees. This conveyance did not operate in the firſt inſtance by fine, but by leaſe and releaſe. Now, nothing paſſed thereby but what the releaſors could lawfully paſs, viz. an eſtate for their lives. Then the ſubſequent fine ſeems to operate no further than as a *releaſe*, and not ſo as to enlarge the eſtate granted by the leaſe and releaſe, but to confirm it; but this is very queſtionable, and deſerves further conſideration. Not that a purchaſer's caſe can be mended thereby.

N. B. The above Opinions were given upon ſeveral Caſes ſtated upon the title.

AFTERWARDS the following deed of indemnity was made and ſtated in a caſe for mr. Wilbraham's Opinion.

BY indentures of leaſe and releaſe, reciting the will of the ſaid ſir Charles Lloyd and the ſeveral ſubſequent tranſactions abovementioned, and alſo taking notice that the ſaid Ann Leighton had entered into a treaty for ſale of the ſaid premiſes; and an objection having been made, that notwithſtanding the ſaid indentures of the 11th and 12th of March 1747 and fine, the inheritance of the ſaid premiſes was, for a full conſideration paid, legally conveyed and veſted in the ſaid Ann Leighton for an abſolute eſtate in fee-ſimple, *diſcharged and deveſted* of all the contingent uſes and eſtates limited and deviſed for the benefit of the children of the ſaid Victoria by the will of her father; and that although a much greater proviſion is by the ſaid ſettlement made by the ſaid Edward Kynaſton out of his own eſtate for the ſaid Victoria and her iſſue than they could be entitled to under the ſaid will, or the ſaid eſtate deviſed could produce, yet as that proviſion extended not to ſuch iſſue of the ſaid Victoria as (in caſe of failure of iſſue of her preſent marriage) *ſhe might have by a future huſband*, it might be doubtful, Whether her children by any ſubſequent marriage, in caſe of ſuch contingency happening, might or might not claim or be intitled in equity to a ſettlement of the ſpecific lands deviſed by the ſaid will, ſubject to the incumbrance affecting the ſame? it is witneſſed that the ſaid Edward Kynaſton, for the conſiderations therein-mentioned, did, with the conſent and approbation of Victoria his wife, and Ann Leighton, grant and demiſe the manor of Hardwicke, &c. and all the eſtate of mr. Kynaſton compriſed in the ſaid indentures of the 14th and 15th of March 1747, to truſtees for two hundred years, in truſt for protecting and indemnifying the ſaid Ann Leighton, her heirs and aſſigns, and the ſaid purchaſed premiſes againſt all claims which any child or children or iſſue of the ſaid Victoria begotten or to be begotten, or any claiming under them can have, claim, ſet up, or be intitled unto, of, and in the ſaid purchaſed premiſes by virtue of the ſaid will of ſir Charles Lloyd; and from and againſt all ſuits, entries, evictions, coſts and charges which the ſaid Ann Leighton, her heirs or aſſigns, or the ſaid purchaſed premiſes might be ſubject to on account of any ſuch claims: and for that purpoſe it is agreed, that in caſe the ſaid Ann Leighton, her heirs and aſſigns ſhould hereafter be evicted or ejected out of the ſaid purchaſed premiſes, or

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any part thereof, or that the ſaid premiſes or any part thereof, ſhould be lawfully recovered by any child or children of the ſaid Victoria, or his, her, or their iſſue, or any other perſon claiming under the ſaid will, or in caſe any entry or claim ſhould be made by or on behalf of them on the ſaid premiſes, or any ejectment delivered or other action or ſuit in law or equity ſhould be commenced or proſecuted againſt the ſaid Ann Leighton, her heirs or aſſigns, for the recovery of the ſaid premiſes or any part thereof, or that ſhe or any of them in any wiſe ſhould be diſturbed in the enjoyment of the ſame by any ſuch children or iſſue, or any claiming under them, that then the ſaid truſtees ſhould by ſale or mortgage of the premiſes thereby granted or demiſed, or by the rents and profits thereof, raiſe ſuch ſums as ſhould be ſufficient to anſwer and pay and make a full compenſation for all the loſſes and damages that the ſaid Ann Leighton, her heirs and aſſigns, ſhould ſuſtain by reaſon of ſuch ſuits, &c.; and alſo all the coſts, &c. which ſhe or they ſhould ſuſtain by reaſon of the ſame reſpectively, and ſhould pay the ſaid ſums ſo raiſed to the ſaid Ann Leighton, her heirs and aſſigns, for and towards the making and effecting ſuch compenſation, &c.

Mr. WILBRAHAM was deſired to conſider the whole circumſtances of this caſe, and give his opinion, Whether it was adviſeable for a purchaſer to accept this title as it then ſtood, ſo as at any time he might make a good and unexceptionable title to a purchaſer, or in caſe he ſhould want to ſell or mortgage or make a ſettlement thereof? or upon the whole, Whether he thought it would be unſafe for him to complete his purchaſe?

OPINION of Mr. WILBRAHAM.

AS the title was not thought a clear one by any of the Counſel who have given their thoughts thereon, the ſame depending on nine queſtions both in law and in equity, it cannot therefore be thought to be adviſeable for a purchaſer to accept it as it ſtands by itſelf without the collateral ſecurity, for the collateral ſecurity argues or rather admits a defect, or at leaſt a doubt of the ſufficiency of the title; ſo that I think that the title muſt depend in ſome meaſure on the ſufficiency of the collateral ſecurity, which, if it be certainly good and ſufficient, will in ſome meaſure cure the defect, ſo as to make the purchaſer ultimately

mately ſecure; but ſtill I cannot ſay that the title to the land intended to be purchaſed is clearly marketable, for ſuch a title ſhould be clear, of itſelf, and ſhould not want the aid of any collateral ſecurity; ſo that it is a matter of prudence rather than law, whether the purchaſer ſhould proceed in his purchaſe.

Lincoln's Inn, R. WILBRAHAM.
April 10, 1755.

TO take off the arguments of the Counſel in favour of the title, I ſtate my anſwer thus: That in the Caſe of Pye and George, lord keeper ſaid, that the relief prayed againſt a purchaſer having notice of the contingent remainders being deſtroyed by the truſtees joining was ſo very plain and reaſonable, that if there was no precedent in the caſe he would make one; and agreeable to ſuch declaration the Caſe of Manſel and Manſel and many others have been determined. And to further illuſtrate this Caſe as to the principal point, which is, how far the truſtees ſhould by implication and not by expreſs declaration be deemed truſtees to ſupport the remainders, notwithſtanding there was a decree for them to convey in the words of the will, ſee the Caſe upon ſerjeant Maynard's will, Talbot f. 3. where the court decreed that a conveyance in the like caſe ſhould be ſettled by the maſter according to the letter of the wills; but upon exceptions to the maſter's report it was ordered, that proper eſtates ſhould be made to ſupport the remainders, that the teſtator's intent ſhould not be fruſtrated: and this reſolution was affirmed in the houſe of lords: ſo in all caſes executory the intent of the parties will in equity prevail againſt the rules of law, as may be ſeen in Talbot's Caſes, 176.

U S E S.

CASE 1.

Mr. BOOTH's OPINION on the import of the word *iſſue* in a deed enuring by way of uſe.

F. H. and *R. H.* his ſon and heir, in conſideration of a marriage then had between the ſaid *R. H.* and *S. B.* daughter of *A. B.* by indentures of leaſe and releaſe did grant, &c. to *J. B.* and three others and their heirs, in truſt to theſe uſes; as for and concerning the meſſuages, &c. to the uſe of *F. H.* for his life, and then the meſſuages, &c. to the uſe of *R. H.* for life, and then to *M. H.* ſon of the ſaid *R. H.* and *S. H.* and the heirs male of his body, &c.; and as for a houſe called ———, after *S. H.*'s deceaſe to the uſe of Rowland and his heirs; and as for and concerning the capital meſſuages, &c. and all other the lands whereof no uſe is limited, to the uſe of *R. H.* for his life, and then to the uſe of the *iſſue* male of the ſaid *R. H.* on the body of the ſaid *S. H.* lawfully begotten or to be begotten; and for want of ſuch iſſue, to the right heirs for ever of *R. H.*

R. H. at the time of this deed had iſſue male born on the body of the ſaid *S.* viz. *M.* and *F.* ſince dead. 1693.

WHETHER *R. H.* is more than tenant for life whilſt his ſon *M.* lives, or any other iſſue between *R. H.* and *S. H.*; or that *R. H.* is tenant in tail now, and may ſuffer a common recovery, and become tenant in fee of the capital meſſuage? or, Whether if he ſuffer a recovery does he forfeit, and may the ſon *M.* enter as iſſue male? Quære,

ALTHOUGH it is undoubtedly true, that at this day a *deviſe* to a man for his life and after his death to his iſſue, or to the iſſue of his body, will give the deviſee an eſtate tail, yet that was not always ſo held, for they formerly took a difference. If the deviſee had no iſſue at the time of the deviſe, they held it an eſtate tail; but if he had iſſue at the time, they held he took only an eſtate for life: *vide* Cro. Eliz. 742. Taylor and Sayer; and Hales' way of citing the Caſe 1. Vent. 229. Nothing therefore can fairly be inferred from the import of the word *iſſue* in a *will*. Anſwer.

THE point here is, Whether by the known rules of law the word *iſſue* can be made a word of *limitation* in a deed,

deed enuring by way of *uſe*, ſo as to carry the inheritance to the perſon from whom the iſſue is to proceed?

It is true, that judges have often gone a great way in making deeds enuring by way of uſe operate according to the intent of the parties, notwithſtanding the informality thereof, or the want of ſkill in the drawers; but it has never yet prevailed, that an inheritance ſhall paſs in lands by deed without the word *heirs*, even though the conveyances have been by way of covenant to ſtand ſeiſed to uſes.

In Co. Litt. 20. b. 2. Inſt. 334. it is laid down as a ground, that an eſtate tail is not to be raiſed in a deed by any other word than the word *heirs*. In 1 Ro. Abr. 837. in the Caſe of Nevel and Nevel 16. Jac. 1. it was held expreſsly, that a feoffment to the uſe of *J. S.* and the iſſue male of his body was not an eſtate tail, for want of the word *heirs*. The ſame Caſe is reported in 1 Brownl. 152.

Thus the law was ſettled for near one hundred years; and then from the reſolutions of the Judges in the Caſe of Leigh and Brace, 5. Mod. 9. and Carth. 343. it was endeavoured to be again made a queſtion, Whether an eſtate tail might ariſe by limitation to the *iſſue* in a deed operating by way of uſe? In that caſe the limitation was to the uſe of *J. B.* and his heirs for ever, and for default of iſſue of the body of the ſaid *J. B.* then to the uſe of the right heirs of *W. B.*; but the word *heirs* was uſed, and the ſubſequent words were uſed only to ſhew that the donor meant heirs iſſuing from or proceeding from the *body* of *J. B.* Accordingly the point, whether the word *iſſue* would create an eſtate tail in a deed operating by way of uſe, came before the court of exchequer in Mich. Term 8 Geo. 2. by the name of *Makepeace* and *Fletcher*, which is reported in *Com.* 447. upon a covenant to ſtand ſeiſed; the words were nearly the ſame as here: and the court all held, that the party had not an eſtate *tail*, but for *life* only.

It

It would be of dangerous conſequence to alter the law in this reſpect. I doubt not but there are hundreds of caſes where eſtates have been limited in this manner, but it has always been where deeds are unſkilfully drawn. When the opinion of any Counſel has been aſked, the anſwer muſt have been uniform, that no eſtate tail would ariſe. And it would ſhake abundance of titles to alter the law in this reſpect. If deeds of uſes muſt be governed by the ſame rules as prevail with reſpect to wills, then a limitation to a man's male deſcendants, or men children, may create an eſtate tail; and an abſolute inheritance may paſs by a limitation to the uſe of the grantee for ever, which will produce infinite confuſion.

I am therefore of opinion, that *R. H.* was only tenant for life; and that *M. H.* with his two brothers became entitled after his death to the ſaid premiſes in *F.* and *B.* as joint tenants for life; and that the reverſion will belong to the claimants under thoſe who purchaſed of *R.* that reverſion being limited to him in fee.

Lincoln's Inn,
May 2, 1750. JA. BOOTH.

Case 2.
1. and 2. Nov. 1729.

By indentures of leaſe and releaſe, cert in hereditaments are conveyed to three and their heirs, during the lives of ſuch three, and the lives and life of the ſurvivors and ſurvivor of them; and during the lives and life of all and every other perſons and perſon who ſhould be added to that demiſe for ever, purſuant to the covenant for renewal therein-after contained.—Mr. Booth's Opinion, Whether the legal eſtate was by this conveyance veſted in the releaſees ſo as to ſupport at law all future renewals?

By indentures of leaſe and releaſe made between George Bridges, eſq. and Ann his wife of the one part, Richard Deſpard, William Carden, and Walter Stephens, of the other part, they the ſaid George Bridges and Ann his wife, in conſideration of the rents, covenants, conditions, and agreements thereinafter mentioned, and reſerved on the part of the leſſees, their heirs and aſſigns, did demiſe, grant, ſet, and to farm let, releaſe, and confirm, unto the ſaid Deſpard, Carden, and Stephens, and to their heirs

and

and aſſigns, the manor of Villers, and certain meſſuages, &c. with their appurtenances, to hold unto the ſaid Richard Deſpard, William Carden, and Walter Stephens, their heirs and aſſigns, from the firſt day of ſaid November, for and during the natural lives of the ſaid Richard Deſpard, William Carden, and Walter Stephens, and the life and lives of the ſurvivor and ſurvivors of them, *and for and during the life and lives of all and every other perſon and perſons that ſhall be added to this preſent demiſe for ever, purſuant to, and in execution of the covenant for renewal of the ſame, as hereinafter is mentioned*: *Reddendum* yearly 800l. for the firſt ſix years and ſix months, and 2000l. yearly afterwards during the remainder of the term and eſtate thereby granted; and which is reſerved to the ſaid George Bridges and Ann his wife, if ſhe happened to ſurvive him, for and during ſo many years of the ſaid eſtate thereby granted as they or either of them ſhould happen to live; and after their reſpective deceaſes, unto the perſon or perſons to whom the reverſion or remainder of the premiſes ſhould belong or appertain.

In which leaſe mr. Bridges covenants with the leſſees, that he and the ſaid Ann his wife, in caſe ſhe ſurvived him, would, within ſix months after the death of the ſaid three lives, and every other life that ſhould be added unto, or be put into, the ſaid demiſe, or any renewal thereof, as each of ſuch lives ſhould happen to die, on payment of 500l. in the common dining-hall of Lincoln's Inn, as a fine, within ſix calendar months next after the death of every ſuch life, unto the ſaid George Bridges, or Ann his wife, if ſhe ſurvived him, or unto their reſpective aſſigns, or to him or them that ſhould be entitled to the remainder or reverſion of the premiſes, and upon the nomination of a new life to be added or inſerted in the room of the life or lives ſo dying within the ſaid ſix calendar months,—they the ſaid George Bridges and Ann his wife, and the ſurvivor of them, or the perſon or perſons who ſhould be entitled for the time being to the reverſion or remainder of the premiſes, ſhould and would at any time after ſuch payment and nomination to be made within the ſaid ſix calendar months, upon requeſt, renew, add to, and put in ſuch other new nominated life in the place of every life ſo dying; and ſo from time to time for ever, by indorſing ſuch new life on the ſaid deed of releaſe, or inſerting the ſame in a label to be thereto annexed for ſuch purpoſe.

The

THE leſſees afterwards covenanted with mr. Bridges and his wife, that the ſurvivors or ſurvivor of them, their, ſome or one of their, heirs or aſſigns, ſhould nominate ſuch new life or lives as aforeſaid, and pay the reſpective fines for each life that ſhould be nominated within the ſaid times, and at the place and in manner before mentioned, and accept of ſuch renewal thereby agreed to be made, and ſeal and execute counterparts thereof.

THAT two of the lives named in this leaſe died in the life-time of, and ſeveral years before, the ſaid mr. Bridges, who alſo died the 13th of May 1751.

AND upon his death the ſaid Ann Bridges, his widow, became ſeiſed of this eſtate for her life, as her jointure under her marriage-ſettlement, with a power of making leaſes thereof for twenty-one years in poſſeſſion; or for one, two, or three lives, under certain terms and reſtrictions; and there being only one life remaining in the ſaid leaſe, *viz.* William Carden, ſhe, by indenture bearing date 1ſt January 1757, and made between her of the one part, and the ſaid William Carden, George Deſpard, and Hannah Stephens, widow, of the other part, did (in conſideration of 1000l. therein mentioned to be paid to her as a fine), remiſe, releaſe, and confirm, the ſaid manor and premiſes, compriſed in the ſaid leaſe of 1729, unto the ſaid William Carden, and to the ſaid George Deſpard and Hannah Stephens, to hold to them and their heirs, for the lives of the ſaid William Carden, William Carden the younger, and James Stephens, and the ſurvivor of them, &c.

In this renewed leaſe or label, the manor and premiſes thereby intended to be demiſed, are not deſcribed in any other manner than by way of reference to the deed of releaſe of the 2d November 1729, whereto this renewal or label is alleged to be annexed (though in fact it was not); nor is there any certain rent reſerved, nor proviſo inſerted for re-entry in caſe of non-payment thereof, but only a general reference as to the rent, reſervations, covenants, and agreements, compriſed in the ſaid leaſe of 1729.

THE ſaid William Carden the elder died ſome years ago, and the late leaſe or renewal, independently conſidered, cannot legally exiſt, becauſe it is not made conformable to the power of leaſing given to or veſted in mrs. Bridges; and the doubt which is now ariſing is under the operation of the *habendum* in the ſaid deed of releaſe of 1729, *viz.* Whether the legal eſtate thereby veſted in the three releaſees

leaſees ſhould continue in the ſurvivor of them, his heirs and aſſigns, ſo as to ſupport all future renewals that may be made *ad infinitum?*

Quære. Is the limitation to the releaſees and their heirs ſufficient legally to ſupport the ſaid renewed leaſe during the now ſurviving life therein, and alſo all future renewals as may be made for ever? or, Is ſuch renewed leaſe defective in point of law, and for what reaſons?

Anſwer. THE great inquiry upon this Caſe muſt be, What was and is the operation of the leaſe made by the indentures of the 1ſt and 2d days of November 1729 ſtated in this Caſe, and of the proviſoes and covenants therein contained, trying, weighing, and conſidering the whole thereof by and upon the rules and principles of law?

I SHALL by no means deny the legality, either at law or in equity, of covenants for renewals of leaſes. I ſhall not deny that covenants for the perpetual renewal of leaſes are valid, and that courts of equity will carry the ſame into actual execution, and decree the performance thereof. The practice of inſerting ſuch covenants in leaſes is general in Ireland, and ſuch covenants have been frequently upheld in the houſe of lords here in England, upon appeals from thence; but no Caſe has ever come to my knowledge, where it has been endeavoured to ſupport contracts or grants for renewals otherwiſe than by the means of arguments founded on equitable principles, which tended to prove, that courts of equity ought to decree ſuch contracts to be carried into execution by a ſpecific performance, like all other covenants and agreements relating to the ſettling or conveying of lands. Now there are plain arguments in equity to prove, that a covenant or agreement for the renewal of a leaſe ought to be decreed to be ſpecifically performed. No purchaſer can be preſumed to haveg ot or obtained a grant or conveyance of the reverſion of lands, compriſed in any leaſe then ſubſiſting thereof, without having ſeen and had full notice of ſuch leaſe, and

and of all the contents thereof. Indeed, if a purchaſer was to go upon the land, and aſk the tenant under what leaſe he held ſuch land, and ſuch tenant was to ſay, that he was tenant at will, and had no leaſe at all, that would be a fraud upon the purchaſer: but if he owned he had a leaſe it would be incumbent on the purchaſer to call for a ſight thereof: if he omitted ſo to do, it would be his own folly, and at his peril; for then he would be deemed to have run the hazard of whatſoever ſhould prove to be the contents of ſuch leaſe, and that would be preſumptive notice. If he actually had a ſight of ſuch leaſe, that would be actual notice; and if afterwards he proceeded to complete his purchaſe, and then, when the purchaſe was made, refuſed, upon application to him made by the tenant or leſſee, to execute a new leaſe in purſuance of the covenant for renewal contained in the old leaſe, it is not to be doubted but a court of equity, upon a bill filed by the tenant or leſſee, would compel ſuch purchaſer to renew, by executing a new leaſe according to the covenant; for he the purchaſer could not plead to ſuch bill that he was a purchaſer without notice, there being ſuch proof of actual or preſumptive notice againſt him as aforeſaid. Now, it is a ground in courts of equity, that notice reduces a purchaſer to the caſe or condition of a volunteer, that is, of a perſon who claims under a voluntary conveyance, and from bounty; againſt whom any third perſon, being a purchaſer, has and would have a right to come into a court of equity to compel him to a ſpecific performance of any contract or agreement that had been entered into with ſuch third perſon, to make him any grant of any eſtate or intereſt in the land. And conſequently in this caſe a court of equity would decree the purchaſer of the reverſion to execute a new leaſe to the tenant or old leſſee, and to renew the ſame from time to time, according to the terms of the covenant for renewal contained in the old leaſe. But then all this is proceeding upon equitable grounds, and

does

does not touch or confirm the legal operation of any ſuch common leaſe with a covenant for ſuch perpetual renewal as I have mentioned. For if you view ſuch common leaſe in the light of a legal conveyance, be it a leaſe for a ſhort term, ſuppoſe three, ſix, or nine years; or be it a leaſe for a long term, ſuppoſe of fifty, ſeventy, or an hundred years; its legal operation, in point of demiſe, can be no more than to give the leſſee, after he has entered, a right to the poſſeſſion; or, to ſpeak with ſtricter propriety, an eſtate in poſſeſſion for a certain determinate number of years, with the immediate reverſion back again; or rather another eſtate to the leſſor back again directly in reverſion; and the additional covenant operates not at law to extend the leſſee's eſtate beyond the period before appointed for its determination, or to paſs or grant to the leſſee any further eſtate whatſoever at law, but only to make a promiſe or an engagement to make another leaſe futurely. The covenant neceſſarily implies at law the very contrary to the paſſing of any actual eſtate or intereſt; for the covenantor is, by the words thereof, made to ſay, that he, his heirs or aſſigns, will, when ſuch and ſuch a particular time ſhall happen as is there expreſſed, make and grant a new leaſe of the premiſes for the like term as he had before granted by that leaſe. It muſt therefore neceſſarily be the intention of the parties, that ſuch an eſtate in the reverſion ſhould be retained by the leſſor as ſhould enable him, his heirs or aſſigns, to carve thereout (when the time ſhall come that he ſhall be called on to perform his covenant) the new term he has before covenanted to grant by way of renewal; and he muſt have the reverſion to be able to carve ſuch new term thereout, upon the rule, *nemo dat quod non habet*. Wherefore the legal operation of any leaſe for a term fixed and certain, accompanied with a covenant therein for a perpetual renewal, has no other operation than any other common leaſe for years to any ſhopkeeper or tradeſman in any market-town in England.

Now,

Now, if we take an inſight into the nature and operation of the conveyance in the preſent caſe, under which the renewable intereſt is here claimed, we ſhall find it will become very difficult to ſay, without examining it attentively, what will be the operation thereof at law. If its operation at law is no other than the operation of ſuch common leaſe as I have laſt mentioned, then it will be a leaſe for a particular term or eſtate; and that term or eſtate being to have continuance no further than to a particular point of time, the duration was not from its very creation to exiſt: and then there being a time when the eſtate thereby granted will determine, the reverſioner's eſtate will again become an eſtate in poſſeſſion; for every leaſe muſt have a determinate certain beginning or commencement, and a certain determinate ending or determination: and therefore, if the leſſee will ſeek to have a prolongation of his eſtate and intereſt under the covenant for the renewal, he muſt have recourſe to a court of equity to compel the reverſioner to make him, from time to time, ſuch new leaſe as the words of the covenant do import. But then, as every one who comes into a court of equity muſt come there with clean hands, and as the agent concerned in intereſt in the preſent caſe informed me, that there are many heads of fraud and impoſition under which they ſhall be able to repel every argument that can be made uſe of in a court of equity for the obtaining a decree for a ſpecific performance of the covenant of renewal contained in this preſent caſe, I ſhall entirely omit the conſideration of the equitable part of this caſe, and leave it to the other gentlemen who ſhall be adviſed with in the preſent caſe to enforce thoſe arguments in ſuch manner as ſhall be moſt conformable to the rules eſtabliſhed in courts of equity, whenſoever this matter ſhall come to be litigated in thoſe courts; and therefore I ſhall apply myſelf ſolely to conſider the legal operation of the preſent grant or conveyance.

FIRST,

FIRST, then, it is a conveyance by leaſe and releaſe, where the leaſe for a year has its operation and effect ſolely from the ſtatute of Uſes; for it is a bargain and ſale to the uſe of the bargainee for one year, and the uſe is derived out of the eſtate of the bargainor; ſo that the bargainor, upon the ſealing of the bargain and ſale, immediately ſtands ſeiſed to the uſe of the bargainee for one year: and inaſmuch as where an uſe is created by virtue of the ſtatute of Uſes 27. Hen. 8. ſuch uſe muſt be derived out of and under the ſeiſin of ſome other perſon, this anſwers what is required by the ſtatute; becauſe inſtantaneouſly, upon the ſealing of the bargain and ſale, an uſe is created for the benefit of the bargainee for a year; and then it may be predicated of the bargainor, that he immediately ſtands ſeiſed to the uſe of the bargainee for ſuch one year. And the ſtatute ſaying further, that wherever any perſon ſtands ſeiſed to the uſe of another for any eſtate or intereſt, he for whoſe benefit ſuch uſe is limited ſhall be deemed to be in poſſeſſion of the land for a like eſtate and intereſt as is limited to him in the uſe, the force and operation in the ſtatute is ſuch, that the bargainee is deemed to be in the actual poſſeſſion of the land for the year as effectually as if a leaſe had been made to him for a year at the common law, and he had actually entered into the land by virtue of that leaſe.

See the Caſe of Shortridge v. Lamplugh, in 2. Lord Raymond. fo. 798.

THIS being the operation of every leaſe for a year made by force of the ſtatute of Uſes, and of the preſent one, it is now to be ſeen what is the operation of a releaſe, when it is grounded upon ſuch preceding leaſe for a year.

NOW a releaſe to a bargainee or leſſee for a year, where it grants to a bargainee a larger eſtate or intereſt than he had before, is that ſpecies of releaſe which is called a releaſe operating by way of enlargement of the eſtate; and this is a conveyance at the common law. And where an eſtate, either of freehold or of inheritance in fee, is granted to the bargainee by ſuch releaſe, the releaſee

gains

gains and acquires such freehold or such inheritance in fee merely by the rules of the common law. For example:—If such release of the lands is to the bargainee, *habendum* to him, his heirs and assigns; that is the limitation to him of an estate in fee simple at the common law. So it is if the words are,—To hold to him the releasee, his heirs and assigns, to the only use and behoof of him, his heirs and assigns. This is also a conveyance operating merely by the rules of the common law: for these words, "to the only "use and behoof," being directed and applied to the very same person as first takes under the *habendum*, do not give or create any statute-use, but serve only to express, in a more emphatical and liberal manner, that the releasee is to take the estate in fee-simple to himself and his heirs, for his and their own use and benefit, which is an use at the common law, and not a statute-use. But where the *habendum* is expressed thus—"*Habend.* to the releasee, his "heirs and assigns, to the use of *A.* for life, then to *B.* for "years, or in tail; then to *C. D. E.* and *F.* or to ten or "twenty others, for ten or twenty different estates," there these will be statute-uses, and incontinently the persons for whose benefit such uses are there expressed or specified must, under the very words of the statute, be taken to be in actual possession, or to have actual vested interests in the lands, according to the estates limited by such uses respectively. And if there are powers reserved to the said *A. B. C. D. E.* and *F.* to make leases, jointures, &c. there, as soon as any such leases or jointures are made, the lessees and jointuresses will have an use or estate in the lands for those terms which are created by the leases or jointure-deeds, provided such estates and interests quadrate with the powers: and the terms, estates, and interests, will be uses derived by force of the statute out of the seisin of the releasee.

It may be perceived from hence, that every ſtatute-uſe muſt be derived out of the ſeiſin of ſome third perſon, ſo that it may be always predicated, that there doth or do exiſt ſome perſon or perſons who doth or do ſtand ſeiſed to the uſe of the ſaid *A. B. C. D. E.* and *F.* for years, life, or in tail, &c. as aforeſaid. And where there is not ſuch ſtanding ſeiſed by ſome ſuch third perſon, ſuch ſtatute-uſe is not good. For example:—If there ſhould be ſuch a bargain and ſale, or leaſe for a year to *J. S.* as I have before mentioned, and then a releaſe to him of the lands, to hold to him and his aſſigns for his life, or to hold to him and his aſſigns only (leaving out the word heirs), to the uſe of *A.* for life, with remainder to *B. C. D. E.* and *F.* ſucceſſively, for life, years, or in tail, as herein before is mentioned; then afterwards, if *J. S.* was to die, all the uſes would be void; becauſe *J. S.* acquiring by the releaſe no larger eſtate or ſeiſin than for his life, and that being determined by his death, there could remain nothing out of which the uſes could be derived; and it could not be predicated that the heirs of *J. S.* ſtood ſeiſed to the uſe of the ſeveral perſons named in the deed: and if ſome perſon or perſons did not ſtand ſeiſed to thoſe uſes, the caſe would not fall within the proviſion of the ſtatute of Hen. 8. which turns no uſes into legal eſtates but ſuch as were truſts before the ſtatute, where there always was a third perſon who held the eſtate, and whoſe conſcience was bound by the truſt. And the words of the ſtatute are ſo framed as to be conformable to the old uſage: it ſays expreſsly that wherever there is a perſon ſeiſed to the uſe of any other perſon, he to whoſe uſe he is ſeiſed ſhall be deemed to be in poſſeſſion of the land for the ſame eſtate as he has in the uſe.

Now, no part of this doctrine would or can be applied to conveyances or releaſes, under which nothing paſſed but bare legal eſtates or old common-law uſes; as if the *habendum* in the releaſe was to be to *J. S.* and his aſſigns, to the

the uſe of the ſaid *J. S.* and his heirs, or to the uſe of the ſaid *J. S.* and the heirs of his body begotten; there that would not be a ſtatute-uſe, as I have ſaid before, but would be the limitation of a legal eſtate, and would be good, as not wanting the ſupport of the ſtatute-uſes. So is the Caſe of Jenkins *v.* Young, Cro. Car. 230. One Redhead gave land to Edward Randall and his wife, *habendum* to the ſaid huſband and wife, to the uſe of them and the heirs of their two bodies; and for want of ſuch iſſue to the uſe of Edward Morgan and his heirs. There it was argued, that the eſtate out of which the uſe ſhould ariſe being no more than an eſtate for life, the uſe could not make the eſtate larger than the limitation; but the judges ſaid, they conceived that there was a difference where an eſtate was limited to one, and the uſe to a ſtranger: there the uſe ſhould not be more than the eſtate out of which it was derived; but not when the limitation was to two, *habendum* to them to the uſe of them and the heirs of their bodies; that was no limitation of the uſe: nor was the uſe to be executed by the ſtatute; but it was a limitation of the eſtate to them, and the heirs of their bodies; and they were in by courſe of common-law: and ſo it ſhould be taken as a limitation to them and the heirs of their bodies; remainder to the other, and the heirs of the other; that the deed might be conſtrued according to the intent of him that made it.

THIS Caſe appears to be argued again in fol. 244, 245. of the ſame book; and there the judges ſaid, that that limitation in the *habendum*, to the uſe of the grantees and the heirs of their bodies, was a limitation of the land itſelf, being all to one perſon; and was as if it had been ſaid, "*habendum* to them and to the heirs of their bodies;" and not like to the Caſe 2. and 3. Eliz. Dyer 186. For true it was, when the eſtate was limited to one or two, to the uſe of others and their heirs, the firſt eſtate was not

enlarged by that implication, and the uſe could not paſs a greater eſtate. But there, where the grant and *habendum* conveyed the eſtate, and the limitation of the uſe was to the ſame perſon, that ſhewed the intent of the parties, and was a good limitation of the eſtate; for it was not an uſe divided from the eſtate, as where it was limited to a ſtranger, but the uſe and eſtate went together: wherefore it was all one as if the limitation had been to them and the heirs of their bodies. They are the words of the book; and lord chief-juſtice Holt expreſſes himſelf in the ſame manner in the Caſe of lord Altham *v.* earl of Angleſey, in Gilb. Rep. fol. 16, 17. "If a fine," ſays he, "be levied to a man and his heirs, to the uſe of him and "his heirs, in this caſe he ſhall take by the common law, "and not by way of uſe."

It is by this time proper to examine the conveyance under which the renewable intereſt here claimed ariſes. It is a conveyance by leaſe and releaſe, and ſuppoſes mr. Bridges, at the time of the execution of the conveyance, was ſeiſed in fee. No difficulty ſeems to ariſe upon the bargain and ſale, or leaſe for a year. I ſuppoſe mr. Bridges, for 5s. conſideration, thereby bargained and ſold the premiſes to Deſpard and his companions, to hold the ſame to the ſaid Deſpard and his companions, their executors, &c. for the term of one year, in the uſual manner. By this bargain and ſale a ſtatute-uſe aroſe for one year to Deſpard and his companions, and mr. Bridges became ſeiſed to the uſe of Deſpard and his companions for one year, which uſe put them into actual poſſeſſion, as actual leſſees or tenants for one year. Then came the releaſe; and by that mr. Bridges granted and releaſed the premiſes to the ſaid Deſpard and his companions, and their heirs, to the only proper uſe and behoof of the ſaid Deſpard and his companions, their heirs and aſſigns, from the firſt day of November, being the date of the leaſe for a year, for

and

and during the natural lives of the said Despard and his companions, and the life and lives of the survivors and survivor of them, and for and during the life and lives, &c. These latter words, for the present, I omit.

First, then, examine the operation of the *habendum*. Had it been, "to hold to the said Despard and his companions, and their heirs," generally, it would have enlarged the estate of the lessees for a year up to a fee; that is, to an absolute estate of inheritance in fee-simple: but the words being, in effect, "to hold to the said Despard "and his companions, and their heirs, from the first day "of November, &c. during the lives of the persons "therein named," that enlarged the estate of the lessees for a year only up to a freehold descendible. I have purposely thrown out the words, "to the use of them and their heirs," for reasons that will presently appear.

Now, suppose a man should enfeoff *J. S.* to hold to the said *J. S.* and his assigns during his life, it would be clear that *J. S.* could take no estate of inheritance under the feoffment, but only an estate of freehold; and consequently it would be as clear: but the reversion in fee and the inheritance would be left in and incontinently return to the feoffor. So if a feoffment was to be, to hold to the feoffee and his heirs during the lives of *A. B. C. D.* and twenty other persons, still nothing would pass but an estate of freehold, and not an estate of inheritance. The freehold would be descendible because of the words, "and "his heirs," which would make the heirs, after the death of the feoffee, special occupants during the lives of the *cestui vies*; but still the reversion and inheritance would be left in and return to the feoffor, immediately after the livery of seisin: and this is what every student knows within six weeks after he has been in the inns of court.

We will now return to the words of the *habendum* in the release, taking in the words, "to the use." The *habendum*

bendum ſtands literally thus: "To hold unto the ſaid Deſ-
"pard and his companions, their heirs and aſſigns, to the
"only proper uſe and behoof of the ſaid Deſpard and his
"companions, their heirs and aſſigns, from the firſt day
"November, for and during the natural lives of the ſaid
"Deſpard and his companions, and the life and lives of
"the ſurvivor and ſurvivors of them." Here you obſerve the uſe limited is not limited to any perſon different from the perſon to whom the eſtate is granted. The *habendum* is to Deſpard and his companions, and the uſe is limited to Deſpard and his companions; ſo that the eſtate and the uſe are both to one and the ſame perſon; and therefore his cannot be a ſtatute-uſe, for the ſeiſin doth not go or belong to one perſon, and the uſe to another perſon: whereas the ſtatute requires that there ſhould be a ſtanding ſeiſed by ſome third perſon or perſons to the uſe of ſome *other perſon*. And that caſe of Young and Jenkins is expreſs, that where the uſe is not divided from the eſtate, and the uſe and the eſtate go together, there it amounts only to a limitation of the eſtate, and conſequently is not a ſtatute-uſe, but only a common-law uſe. And if at this day a man ſhould enfeoff *J. S.* to hold to the ſaid *J. S.* and his heirs, to the uſe and behoof of the ſaid *J. S.* and his heirs for ever, no man living would call that a ſtatute-uſe; for the words would import no more than the words 'for his and their ſole benefit and behoof,' and would only ſerve to ſhew in how ample and beneficial a manner the feoffee was to take the eſtate limited to him by the *habendum*, which being manifeſtly an eſtate at common-law, could not alſo give or create a ſtatute-uſe. The words of lord Holt in the caſe of lord Altham *v.* earl of Angleſey, before recited, are directly in point. In like manner it would be, if there were a feoffment to a man and his aſſigns, to hold to that man and his aſſigns to the only uſe and behoof of him and his aſſigns during his life, that would

would only limit an eſtate of freehold to him for his life at common law, and not be the limitation or creation of any ſtatute-uſe. It would be the ſame in the caſe of a feoffment to one of lands, to hold to the feoffee and his heirs, to the only uſe and behoof of the feoffee and his heirs, during the lives of *A. B. C. D.* and twenty other perſons. There the words to the uſe and behoof" would paſs no ſtatute-uſe, or paſs any thing diſtinct from the eſtate, which eſtate would be an eſtate at common law; and the words "to the uſe and behoof" would ſerve only to ſhew the amplitude of the eſtate given by the feoffment, and that the feoffee and his heirs were to take the ſame for his and their own benefit, without return of any ſervice whatever to the donor. Yet in this caſe, as nothing but a freehold deſcendible would paſs, the reverſion and the inheritance muſt be underſtood to be ſtill left in, and to return immediately after the livery of ſeiſin to, the feoffor and his heirs.

UNIVERSITY.

CASE.

It being the duty of the proctors, upon an appeal from an inferior to a ſuperior court of juſtice in the univerſity of Oxford, to inhibit the judges of the inferior court, and ſummon thoſe of the ſuperior court, and ſwear them into their office;—Mr. FORD's OPINION, What redreſs an appellant in whoſe behalf a proctor refuſes to execute his office would be entitled unto.

BY a ſeries of royal charters, confirmed by act of parliament, an ample juriſdiction is granted to the chancellor and ſcholars of the univerſity of Oxford, for the trial and deciſion of *all* cauſes, whether civil or criminal, in their own courts *(exceptis cauſis liberi tenementi, mahemii felonie et proditionis.)*

THIS juriſdiction hath ever been exerciſed in three different courts held within the Univerſity, *viz.*

FIRST, the *chancellor's court*; in which the chancellor of the Univerſity, or his commiſſary or vice-chancellor, ſitteth as judge; from whoſe ſentence there lieth an appeal.

SECONDLY, the *houſe of congregation*; which houſe annually appointeth ſeven of its members, (*viz*) two doctors of divinity, one of laws, one of phyſic, and three maſters of arts, *qui, ut ſtati delegati, cauſas omnes appellationum à cancellario ejuſve vice-cancellario ad domum congregationis devolutas, audiendi et terminandi per totum annum in ſequentem poteſtatem habeant*; and from this court, conſiſting of the delegates of *congregation*, an appeal lieth.

THIRDLY, the *houſe of convocation*; which houſe annually appointeth nine of its members, *(viz)* two doctors in divinity, two of law, two of phyſic, and three maſters of arts; *qui ſimiliter ut ſtati delegati, anno inſequente, cauſas appellationum à domo congregationis ad domum convocationis delatas audiant et determinent; et quicquid in quâcunque cauſâ major pars omnium delegatorum utriuſque domûs reſpectivè ſtatuerit vel decreverit, ratum ſit et effectum debitum ſortiatur.*

N. B. IF the ſentence pronounced in theſe three courts are *ſententiæ conformes*, the judgment given in the laſt court is *final*: but if there be any contrariety between any one ſentence and another in theſe courts, in ſuch caſe an appeal lieth from the laſt of them (*viz.* the convocation).

FINALLY, *ad regiam majeſtatem in cancellariâ.* Be it obſerved, that the *firſt* of theſe courts (*viz.* that of the chancellor) is in Term time always open to ſuitors to that court;

court: but the judges delegate of the *ſecond* and *third* court never aſſemble and ſit as a *court*, but in the caſe of an appeal's being actually preferred to them from the court immediately below their's reſpectively; and becauſe the judges of the two upper courts (annually delegated as aforeſaid) are not always reſident in the Univerſity to receive an appeal, and to inhibit the court below; for the benefit therefore of an appellant, and for the more ſpeedy attainment of juſtice, the local ſtatutes and laws of the Univerſity direct, that when an appellant hath duly interpoſed his appeal from a court below to the immediate court above, he ſhall (within three days after ſuch interpoſition) ſignify the ſame to the two proctors of the Univerſity, who are ſuppoſed to be always reſident; and they, in the name of the court of delegates, to which the appeal is preferred, ſhall, by virtue of their office, *inhibit* the judge or judges of the court below, from which the appeal is brought, *et ne ulterius in hujuſmodi cauſâ prædant, moneant, ſive interdicant*

This done, the proctors call to the bench the judges of the court above, ſwear them into their office, and they proceed to hear the merit of the appeal, affirming or reverſing the judgment paſſed in the court below.

In Michaelmas Term 1751 a proſecution was commenced *i. e.* an accuſation *in ſcriptis* was exhibited in the loweſt court by Radclyffe Howard, doctor of laws, and George Wilmot, maſter of arts, againſt *W. L.* doctor of phyſic, for certain heinous and ſcandalous offences by him the ſaid *W. L.* committed, with the proof of which the proſecutors onerated themſelves *ſub pœnâ calumniæ*, and prayed that a citation might iſſue againſt the ſaid *W. L.* to appear, anſwer, &c. &c.

The vice-chancellor, as judge of this court, by an interlocutory decree, abſolutely rejected the accuſation, and refuſed the citation prayed. From this unjuſt decree the proſecutors brought their appeal in due time, and in due form of law, to the houſe of congregation; and according to the directions of the ſtatutes above-mentioned ſignified ſuch their appeal to the two proctors of the Univerſity, *A. B.* and *C. D.* and obtained from them an *inhibition* on the court below, which was ſerved on the judge and regiſter of that court.

The judges delegate of the houſe of congregation aſſembled on the bench accepted the juriſdiction, and were ſeverally ſworn into their office; the appeal was exhibited, read

read in their preſence, and a motion made, by the proctor (or advocate) for the appellants, for a citation to iſſue againſt the party *appellate*, William Lewis, to appear and anſwer, &c. On this motion the delegates took a fortnight to deliberate; then met again, refuſed to decree a citation, diſmiſſed the appeal, and diſſolved their juriſdiction.

FROM this ſhameful interlocutory the appellants bring their appeal *from* them to the houſe of convocation; but they have reaſon to apprehend, that one of the Univerſity proctors *(viz. C. D.)*, though he readily joined with his colleague *A. B.* in inhibiting the *firſt* court, and in handing the appeal from that court to the delegates of *congregation*, will, at this time, refuſe to unite with *A. B.* in a neceſſary act of office, *viz.* in inhibiting the delegates of *congregation*, and in handing this ſecond appeal to thoſe of *convocation*, who are ready to enter upon the duty of *their* office when called upon.

N. B. THE inhibition muſt be ſigned both by *A. B.* and *C. D.* or there is an abſolute failure of juſtice, and the cauſe is ſtopped in its progreſs from the ſecond to the third court.

NOTE likewiſe, there is no proviſion made in the Univerſity ſtatute *(de judiciis)* for ſuch an abſurd procedure on the part of one of the Univerſity proctors; and it is ſuppoſed the caſe never happened until this time. If the caſe ſhould now happen, and *C. D.* ſhould abſolutely refuſe to join *A. B.* in inhibiting, &c.

1. Quære. Is not this a neceſſary act which *C. D.* is *obliged* to perform *virtute officii?*

Anſwer. SUPPOSING this to be a caſe in which an appeal lies, and that the ſtatutes are compulſory upon the proctors to inhibit the inferior juriſdiction after an appeal is duly preferred, I think, *C. D.* cannot juſtifiably refuſe doing his duty in inhibiting. But I do not ſee that, according to what is ſtated of the ſtatutes, it is a matter of duty in the proctors to receive or hand the appeal. However, if that has been the uſual method of carrying on theſe proceedings, I think, it will be prudent for *C. D.* to conform to the practice of his predeceſſors, though it does not at preſent appear to be a matter of ſtrict duty.

Is

Is it to be ſuppoſed that the progreſs of a momentous cauſe from one court to another can be impeded by the caprice of *C. D.* in refuſing to join his colleague *A. B.* in this neceſſary act of office? 2 Quære.

I THINK, it is never to be ſuppoſed that any officer, either judicial or miniſterial, can capriciouſly and arbitrarily obſtruct the progreſs of any cauſe whatſoever. Anſwer.

WILL not ſuch refuſal on the part of *C. D.* be deemed an unreaſonable partiality in favour of the offender William Lewis, who by ſuch means may eſcape out of the hands of juſtice, and avoid the cenſure of the delegates of convocation? 3 Quære.

UNLESS I was appriſed of the reaſons *C. D.* may urge for ſuch a refuſal, it is impoſſible to impute it to partiality, caprice, or any unjuſt motive; and therefore I can only ſay in general, that if he, or any other perſon cauſeleſsly declines executing his duty, ſuch a conduct muſt be aſcribed to partiality, or ſome other undue influence. Anſwer.

WILL not *C. D.* by this refuſal to hand the appeal to the delegates of convocation, as far as in him lies, ſtop the final progreſs of the appellants to the king's majeſty, ſince the appellants muſt go through the court of *convocation* before they can appeal to the crown? 4 Quære.

IF the appeal to the crown lies only from the delegates of convocation, there can be no queſtion but that court muſt firſt give judgment before ſuch an appeal can be proſecuted to the king. Anſwer.

WILL not this refuſal on the part of *C. D.* an individual officer, be a ſufficient foundation, on which Howard aad Wilmot, the parties appellant to the convocation, may move the court of king's bench for a rule againſt *C. D.* to ſhew cauſe why a *mandamus* ſhould not iſſue out of that court to compel him to do an act of mere office? or, 5. Quære.

LASTLY, What proper method in law or equity can be purſued to oblige *C. D.* (if obſtinate) to do his duty in this caſe?

IT

Anſwer. IT is not a ground for the court of king's bench to grant a *mandamus*, that an inferior officer refuſes to do his duty, unleſs there is no other way of compelling him to perform it. The king's writ of *mandamus* is an extraordinary remedy, and never goes to inferior juriſdictions, where there is any ſuperior to whom ſuch officer is accountable for his conduct; and therefore, if the chancellor or vice-chancellor of the Univerſity, or the collective body of the Univerſity, have any coercive power over the proctor, there is no pretence to apply to any court of law or equity for relief. Beſides, if this was a proper caſe for the interpoſition of a court of law, in reſpect of any defect of juriſdiction in the Univerſity over *C. D.* yet the king's bench would never iſſue a *mandamus*, unleſs it appeared to be a matter of ſtrict duty; and as this does not appear to me with regard to his receiving or handing the appeal, and as courts of law are extremely tender in meddling with Univerſity privileges, I cannot take upon me to ſay, there is any remedy to be expected from thence; nor am I able to ſay any thing more poſitively on any of the queſtions propoſed than as above, for want of ſeeing the ſeveral ſtatutes concerning the execution of this juriſdiction, and knowing the foundation upon which the ſeveral ſentences of diſmiſſion already made have been built.

Middle Temple, JOHN FORD.
January, 29, 1725.

VENDOR

VENDOR AND VENDEE.

Case. The Opinion of Mr. Booth, Whether the expences of levying fines to bar dower, and of deducing and abstracting the title, are to be borne by the vendor or vendee.

A. and *B.* agreed to submit this affair to the decision of mr. Booth, and therefore requested his Answer to the following *Quære:*

Whether, in cases of this sort, are the expences of fines to bar dower to be paid by the seller, or by the purchaser? and, Is or is not the seller either to deliver up to the purchaser original deeds or copies, at the seller's expence, sufficient for the purchaser to protect his title? and, Is the seller or the purchaser to pay for the abstract of the title-deeds, and the fee to the purchaser's Counsel for his Opinion thereon, and for searching for judgments? Quære.

There are several questions in this *Quære*, and they require separate answers. Answer.

First, As to the fines that were requisite to bar dower. And as to these, I think, it belonged to the seller to be at the expence of these fines, if no special agreement was made concerning the same. For, suppose the buyer *B.* would have consented to take a common conveyance to himself in fee from *A.* the vendor, with the condition and usual covenants as they stand in all the precedent books, then *B.* would have had covenants in the same conveyance from *A.* that *A.* was seised in fee-simple, and had good right, &c. to convey to *B.* and his heirs, without any act, matter, or thing, to charge, alter, vary, impeach, or restrain the same; and that the said *B.* his heirs and assigns should from thenceforth quietly hold and enjoy, and take the rents and profits without any let, suit, interruption, &c. and that free and clear from all former and other gifts, grants,

grants, bargains, ſales jointures, ſettlements, dowers, rights and titles to dower, rents, forfeitures, charges, titles and incumbrances, &c. As this clearly would be ſo, it would be as clear that theſe covenants would be broke not only on the death of *A.* the ſeller, but even the inſtant of the deeds of conveyance being executed; for *A.* having a wife living, her title to dower had attained and commenced before the ſale; and to make a clear title, it was abſolutely neceſſary for *A.* to procure his wife to join in fines; which if ſhe refuſed to do, her title would be outſtanding and a charge on the premiſes; and that would be a breach of the covenant, for which damages would be recoverable. I take the rule of practice to be, that the buyer is to be at the expence of taking a clear eſtate of inheritance in fee-ſimple out of the ſeller, his mortgagees or aſſignees, or truſtees, to himſelf. If the ſeller is tenant in tail, with reverſion clearly in himſelf in fee, then the ſeller muſt be at the expence of fines, if the buyer is contented therewith. If he is tenant in tail with remainder over, or with the reverſion to a ſtranger, there he muſt be at the charge of recoveries to unclog and unfetter the title. So as to incumbrances, the incumbrancers muſt at his charge acknowledge ſatisfaction on record, or aſſign, as the caſe may require. If this was not ſo a purchaſer, after having fixed his price with the ſeller, might be ſaddled with another year's purchaſe, or more, for the expence of the conveyances; and the more debts and incumbrances the ſeller had charged on the eſtate, the dearer would the eſtate be to the purchaſer. Purchaſers expect to find all theſe matters eaſy and clear; and if they are not ſo, it is incumbent on the ſellers to inform them of the truth of the caſe, and not to keep them in ignorance. A title to dower is as much an incumbrance as a grant of a rent-charge to a ſtranger for life (to the amount of one-third of the value of the land), to commence on the ſeller's death; and

and I conſider the caſe in the ſame light; ſo that I have no doubt of its being a charge. As to the coſts of ſearching the records for judgments, ſtatutes, &c. I think, that if nothing was found but what was before diſcloſed to the purchaſer, then the coſts ought to be borne by the purchaſer, for the vendor was in no fault.

THE fees to counſel ſhould be paid by the purchaſer; it is the practice, and he names the counſel himſelf. The expence of making the abſtract belongs alſo to the purchaſer. He employs therein his own ſolicitor, who takes ſuch methods to lay a proper expoſition of the ſtate of the title before the counſel as he ſees moſt conducive to the intereſt of his client.

As to the procuring the title-deeds to be lent, in order to be laid before counſel, I apprehend, the expence of that (if any) muſt lie on the vendor, whoſe buſineſs it is to ſhew the deeds, and to produce every thing that tends to evidence the title. Conveyances that are accurately drawn generally contain a grant of all deeds, evidences, and writings, touching the premiſes only, or only any part, and true copies of all ſuch other deeds, &c. as concern the premiſes jointly with any other lands; ſuch copies to be taken at the expence of the purchaſer, his heirs and aſſigns. The precedent books are all thus for theſe laſt hundred years; and ſo, I apprehend, is the practice; though this ſometimes falls very heavy on the purchaſer.

Theſe copies are now uſually paid for by the vendor, if demanded before the execution of the purchaſe deeds.

Lincolns Inn,
November 14, 1758. JAS. BOOTH

WASTE.

WASTE.

SETTLEMENT to the uſe of *R. S.* for life; remainder to *G. S.* for life; remainder to the firſt and other ſons of *G. S.* in tail male; remainder to *J. S.* for life; remainder to the firſt and other ſons of *J. S.* in tail male; remainder to ſettlor and his heirs. *R. S.* died and *G. S.* died without iſſue. *J. S.* entered, and during his life cut down great quantities of timber for ſale, having no ſon at the time. *J. S.* died without any ſon, and the heirs of the ſettlor ſet up a demand for the timber cut down by him.

Mr. DUNNING's OPINION.

I THINK, ſir *W. O.* as being entitled to the firſt eſtate of inheritance at the time when the timber was cut, might have recovered the *value* of it in an action of *trover*, or the produce of it when ſold by an action for ſo much money had and received to his uſe. The former action, being for a *tort*, was loſt by the death of the party, except as to ſo much of the timber as remained and came ſpecifically to the hands of the executors; the latter was equally competent againſt the executors as againſt the teſtator himſelf in his life-time. But as ſir *W. O.* though appriſed (as is ſtated) of the injury done him at the times it was committed, has not hitherto taken any of the ſteps he might have taken to recover ſatisfaction for it, but on the contrary has acquieſced in the manner above ſtated, by means whereof the executors would be involved in difficulties if they were now made to account for the timber, I think a court of equity will not interpoſe; and the ſtatute of limitations has, I preſume, barred his *legal* remedy. If any part of the timber came to the hands of the executors, or was ſold ſo recently before the teſtator's death that ſir *W.* is yet in time to ſue for it at *law* I think he may,

may, if he pleaſes, require ſatisfaction for *ſo much* of it; but, as I conceive, no further.

1769. J. DUNNING.

Three Quæries, and Mr. YORKE's OPINION on ſame Caſe.

HAD the ſaid *J. S.* being merely a tenant for life under both ſettlements (not having the uſual or ſimilar words in his favour "without impeachment of waſte"), a right to cut timber for ſale? or, Could this right (either in law or equity) be derived to him by implication from theſe words in the jointure, "and having power, &c." *ſo that every ſuch leaſe or jointure be not made without impeachment, or diſpuniſhable of or for any manner of waſte, by any* expreſs words therein-mentioned?

1. Quære.

Mr. YORKE's OPINION.

I AM of opinion, that *J. S.* was a mere tenant for life, ſubject to impeachment of waſte; and no right to cut timber can be implied for his benefit, or annexed to his eſtate, by virtue of the words referred to in the leaſing power, *viz. ſo as ſuch leaſe be not diſpuniſhable of waſte, by expreſs words, &c.* This caution in the leaſing power was ſuperfluous in the preſent caſe, becauſe *J. S.* could not convey any ſuch right to a leſſee, not having it in himſelf. In order to ſupport ſuch an intereſt in *J. S.* it muſt be contended, either that he was tenant for life *without impeachment of waſte by expreſs words*, or elſe, that he was entitled to cut timber for ſale by the *nature* of his eſtate, in like manner as a tenant in tail, or a tenant in tail after poſſibility of iſſue extinct. But he could claim in neither light; for expreſs words are wanting in his favour, and the eſtate limited to him is *merely* for his life.

2. Quære.

As neither *J. O.* nor his ſon *W. O.* had any veſted intereſt in the eſtate at the time the waſte was committed (the limitation to them being contingent on *J. S.* dying without iſſue male), and conſequently at the time had no certain injury done them, Will the ſtatute of limitations run from the time of felling the timber, or from the ſaid *J. S.*'s death, when the injury to them became certain?

Anſwer. *J. O.* and *W. O.* had veſted remainders at the time of the waſte committed, and the injury was certain; but under all the circumſtances ſtated, I am of opinion, that the relief to be obtained in this caſe muſt be ſought in equity, out of the aſſets of *J. S.* who cut down the timber, upon a bill to be filed for an account and ſatisfaction againſt *the executor*. No *legal* remedy can be had; for the action of waſte could *not* be brought by the owner of the inheritance, *W. O.* the remainder-man in tail, during the life of *J. O.* his father, who was entitled in remainder for life; and *J. S.* dying before *J. O.* ſuch action never could be brought. Neither can trover be maintained now againſt the executor of *J. S.*; not only becauſe there is no inſtance of a like action againſt an executor, but becauſe the ſtatute of limitations is a bar. That remedy might have been purſued within ſix years after the timber cut by *J. S.* in the name of *W. O.* againſt *J. S.* himſelf; and if the whole term had lapſed in the life-time of *J. S.* I ſhould have thought it a conſiderable objection to any bill in equity for relief by way of an account againſt his executor. But the teſtator *J. S.* having died recently after the waſte committed (as I am informed,) by whoſe death within ſix years the action became impoſſible, and the executor having entertained an amicable treaty for a ſatisfaction to be agreed (which occaſioned the delay of filing a bill) till September 8, when the ſix years expired, and the ſtatute of limitations was firſt urged, I am of opinion, that a court of equity will not think that *W. O.* ought to be barred by length of time.

3 Quare. If the ſtatute muſt run from the time of the waſte being committed, under the particular circumſtances of the two ſeveral applications being made to the executor on this account, the one within a year after *J. S.*'s death, the time when the injury became certain and known to *J. O.* or *W. O.* the ſecond in February 1768 before ſtated, when the amicable negociations began, and alſo under the general circumſtances of this Caſe, Will not equity interpoſe,

interpoſe, give *ſome* remedy, and *what*, to *W. O.* the remainder-man in tail (and executor to his father *J. O.* the tenant for life, without impeachment of waſte, on the ſaid *J. S.*'s death without iſſue male), for recovering ſatisfaction for the timber cut and ſold by the ſaid *J. S.*? or, Will any of the objections made by the ſaid huſband of one of the reſiduary legatees (according to the facts ſtated at the end of this Caſe) prevent the interpoſition of equity to give relief againſt the ſtatute of limitations?

Anſwer. I THINK, that the relief in equity muſt be by an account taken of the value of the timber, and a decree for payment of that value.

THE objections made by the huſband of one of the reſiduary legatees will not weigh, in my apprehenſion, as a defence againſt the plaintiff's equity. The converſation held by *W. O.* was general, not by way of inducement to the marriage, to the terms of which he was a ſtranger, and in no ſenſe party to the treaty: nor does the marriage-ſettlement appear to have depended on the wife's ſhare of *J. S.*'s perſonal eſtate, amounting to any particular ſum, which will be eventually diminiſhed by the ſucceſs of *W. O.* in the ſuit propoſed.

November 2, 1769. C. YORKE.

WILLS.

CASE 1.

W. K. upon his death-bed admitted a promiſe made by him to his nephew to leave the latter 100l. and declared, that he would have his executor whom he had appointed by a will made ſome time before, pay it. The executor, who was preſent replied, that what the teſtator ſaid ſhould be done. *W. K* dies the day following. —Mr BUNBURY'S OPINION, Whether the executor was compellable to pay this money if there were aſſets?

WILLIAM KENINGALE being very ill, he ſends for mr. Haynes, the miniſter of the pariſh, who after he had done his duty on that occaſion aſked the ſaid William Keningale, if he had ſettled his worldly affairs: to which he anſwered, he had not; and deſired mr. Haynes to be with him on the day following, to aſſiſt him therein; that is, to alter his will for him, as will appear hereafter. And mr. Parſons, the apothecary, was in the room when this diſcourſe paſſed between mr. Keningale and mr. Haynes.

9 Nov. 1742.

ON the day following, being the 9th November 1742, mr. Haynes went again to the ſaid William Keningale's, where he then met John and William Keningale, the aforeſaid William's nephews. And being all in the room where the ſaid William was, the ſaid John Keningale (being appriſed of his uncle's intentions) produced his uncle's will, which mr. Haynes was deſired to read to the teſtator; which he did accordingly; and then aſked him, if he (the ſaid William) intended to alter it. Upon which William the nephew ſaid, "Uncle, you know that "you promiſed to leave me 100l." To which the teſtator anſwered, that he did, and would have his executor (the ſaid John Keningale his other nephew) pay it. To which the ſaid John anſwered, "Uncle whatever you "ſay ſhall be done, and I will do every thing that is fair "and juſt; and mr. Haynes ſhall know it." Of all which mr. Haynes ſome time after made a memorandum; and all which he ſays in his memorandum he remembers ſo well, that he could teſtify it upon oath, if there were occaſion. And one Elizabeth Rayner, who was then a ſervant to the ſaid teſtator, and in the room when the ſaid diſcourſe paſſed, will corroborate what mr. Haynes will teſtify; and ſhe affirms, that the ſaid John Keningale promiſed he would give the ſaid William the nephew a bond for the ſaid 100l. within three days after.

THE

THE day after, being 10th November 1742, William the teſtator died; ſince whoſe death John the executor has been applied to, either to pay this 100l. or give ſome ſecurity for it; but he has refuſed, and ſtill refuſes, to do either of them, though much more than ſufficient to pay all the teſtator's debts and legacies has come to his hands, by virtue of the ſaid executorſhip. 10. Nov. 1742.

As this Caſe is circumſtanced, Will not a court of equity compel the ſaid John Keningale, the executor, to pay unto the ſaid William, the teſtator's nephew, the ſaid 100l. out of the perſonal eſtate and effects of the ſaid William Keningale the teſtator, if there is no want of aſſets in his hands for that purpoſe? Quære.

UPON this ſtate of the Caſe, there ſeems to me ſufficient evidence to ſhew, that it was the intention of the teſtator to alter his will in favour of his nephew William; and that he did not do it, upon the aſſurance of his nephew John, that he would do whatever the teſtator ſhould ſay; and therefore I am of opinion, that a court of equity will look upon this as a fraud in John; and conſequently will decree him to pay the 100l. to William, if there are ſufficient aſſets for that purpoſe. Anſwer. 1. Vernon, 296. Thyn v. Thyn.

March 9, 1743. W. BUNBURY.

MRS. BARBARA ALLGOOD was in her life-time ſeiſed of a copyhold cloſe, within the manor of Hexham, called the Broad Cloſe. CASE 2. A teſtatrix ſeiſed of copyhold lands to which there was a right common appurtenant, in 1744 ſurrenders them to the uſe of her will; and in January 1755 diſpoſes of them by her

AT a court held for the ſaid manor in 1744, the ſaid cloſe, with the appurtenances, was ſurrendered into the hands of the lord, to the uſe of the ſaid *B. A.* and her aſſigns, for and during the term of her natural life; and from and after her deceaſe, then to and for ſuch uſes, intents, and purpoſes, and of ſuch perſon and perſons, his, her, and their heirs, as ſhe, the ſaid *B. A.* in and by her laſt will and teſtament in writing, or by any other writing under

will, and deviſes the reſidue of her real eſtate to another. In the May following the commiſſioners under an incloſure act allot to teſtatrix certain lands in lieu of her right of common. Teſtatrix then dies.—Mr. WILBRAHAM'S OPINION to whom the lands allotted belonged.

under her hand and ſeal, by her duly executed, in the preſence of three or more credible witneſſes, ſhould limit and appoint; and for want of ſuch limitation and appointment, then to the uſe and behoof of the heirs and aſſigns of the ſaid *B. A.* for ever.

THERE were two large waſtes or commons belonging to Hexham, upon which the copyholders and freeholders at that place, in right of their ſeveral freehold and copyhold lands, had a right to graze cattle.

A DIVISION of thoſe commons was agreed upon, and an act of parliament paſſed in 1753 for that purpoſe; wherein, after giving power to commiſſioners to divide, &c. amongſt other things it is enacted, "That immediately after finiſhing the ſaid diviſion and allotments, "and the execution of the ſaid award or inſtrument, "all right of common, in, over, and upon, the ſaid two "commons, and alſo in, over, and upon, the ſaid King-"ſhaw Green and Lambſheel Lane, ſhall ceaſe and be ex-"tinguiſhed; and the ſaid lots and parcels of land ſo to "be aſſigned and allotted as aforeſaid ſhall be held and "enjoyed by the perſons to whom the ſame ſhall be ſo "aſſigned and allotted reſpectively, in the ſame manner "and by the ſame tenure as the reſpective lands, tene-"ments, or hereditaments, in right of or for which the "ſaid lots or parcels of land ſhall be ſo aſſigned or allotted, are now holden."

Words of the act.

THE commiſſioners named in that act, on the 3d of May 1755, made their award; and after awarding ſeveral allotments, ſet out one for the ſaid Barbara Allgood in the following words: "And we do hereby ſet out, aſſign, "and allot, unto Barbara Allgood of the town and county "of Newcaſtle-upon-Tyne, widow, in right of her copy-"hold lands within the manor and townſhip of Hexham, "having a right of common upon the ſaid moors and "commons, eleven acres three roods fourteen poles of land, "more or leſs, parcel of the ſaid common, as the ſame is "by props and land-marks ſtaked and ſet (ſubject to a "foot-path or paſſage, hereinafter ſet out, leading acroſs "the ſame, having the allotment hereinbefore ſet out to "Thomas Baxter, and the incloſed lands called Howtley, "on the Eaſt; lands hereinafter allotted to William "Graham, on the South; the Dipton road, on the Weſt; "and the allotment hereinbefore ſet out to Philip Rowell, "on the North. And we do order, direct, and appoint, "that the ſaid Barbara Allgood, and all perſons, owners, "or occupiers of the ſaid allotment ſhall, within twelve "months

Words of the award.

" months from the date hereof, make and erect, and for " ever uphold and maintain, good and ſufficient boun- " derfences on the Eaſt, on the Weſt, and on the North " ſides of the ſaid allotment."

THE ſaid Barbara Allgood, by her will, dated the 31ſt January 1755, deviſed as follows:

" I GIVE, deviſe, and bequeath, unto Lancelot Allgood, Words of the will.
" eſq. his heirs, ſequels, and aſſigns, all that my copy- " hold Cloſe ſituate near Hexham aforeſaid, and called by " the name of the Broad Cloſe, upon truſt, and to and for " the uſes following (that is to ſay), in truſt, and to and " for the uſe of his ſon James Allgood until he attains the " age of twenty-one years; and after his attaining that " age, then in truſt, and to and for the uſe of the ſaid " James Allgood, his heirs and aſſigns, for ever. But if it " ſhall happen the ſaid James Allgood dies before he at- " tains ſuch age, then I give, deviſe, and bequeath, all the " ſaid Cloſe, with the appurtenances, to ſuch other the " children of the ſaid Lancelot Allgood, their heirs, ſe- " quels, and aſſigns, as the ſaid Lancelot Allgood ſhall, by " any deed or writing, or laſt will or teſtament, give, de- " viſe, limit, and appoint; and for want thereof, to the " uſe of all and every other the children of the ſaid Lan- " celot Allgood, their heirs, ſequels, and aſſigns, for ever, " to hold as tenants in common, and not as joint-tenants."

AND then the ſaid *B. A.* appoints Robert Ilderton executor, and reſiduary deviſee and legatee, in the words following: " I give, deviſe, and bequeath all my mo- " nies due to me upon any ſecurities whatſoever, all my " houſhold goods and furniture, plate, ready money, and " linen and woollen, not by me herein before diſpoſed of " or bequeathed, and all the reſt, reſidue, and remainder, " of all my real and perſonal eſtate, or other eſtate and " eſtates of whatſoever nature or kind the ſame be, unto " the above-named Robert Ilderton, of Hexham, his heirs, " executors, adminiſtrators, and aſſigns, for ever. And " I hereby make and appoint the ſaid Robert Ilderton, of " Hexham, ſole executor of this my laſt will and teſta- " ment, hereby revoking and making void all former " wills, &c." Dated 31ſt January 1755.

THAT the ſaid Barbara Allgood on the 29th of February 1756, departed this life without making any other will.

As the ſaid *B. A.* upon the diviſion paid a proportionable ſhare of the charge thereof, and took a diſtinct eſtate, purſuant

purſuant to the act of parliament of the allotment of common, before her death, but after the date of her will, and the firſt part of the deviſe to Lancelot Allgood being of the Cloſe only, and as ſhe the ſaid *B. A.* died ſeiſed of no other undiſpoſed-of real eſtate which the ſaid Robert Ilderton could take by virtue of the reſiduary deviſe, and as ſhe had an intereſt in thoſe commons, but not a diſtinct eſtate, till after the diviſion thereof under this act of parliament;

Quere. WHETHER this ſhare or allotment of common (under this will) belongs to Lancelot Allgood, in truſt for his ſon, or to Robert Ilderton, the executor and reſiduary deviſee?

Anſwer. IT ſeems to me, that as the teſtatrix was not ſeiſed of theſe lands at the time that ſhe made her will, they could not paſs by her will; for though ſhe was ſeiſed of the common, as appurtenant to the lands, when ſhe made her will, and though the lands were ſubſtituted in the place of the common, yet they could not paſs, I think, as appurtenant to the lands, they being a corporeal inheritance, and therefore could not be appurtenant to a corporeal inheritance. But as the teſtatrix lived till after theſe lands were awarded to her, and therefore as theſe lands were (as it were) a new acquiſition to her, I incline to think, that ſhe could not deviſe it by the will made before it was awarded to her. Beſides, as it ſeems to be copyhold, being by the act of parliament of the ſame tenure that the common was which was appurtenant to copyhold, I incline to think, that theſe lands did not paſs by the will, either to the particular or to the reſiduary deviſee, but will deſcend upon the heir at law.

Lincoln's-Inn, R. WILBRAHAM.
March 27, 1756.

ONE

CASE 3.
A teſtatrix by her will, among other legacies, bequeaths to *J. B.* 5l. and conſtitutes him and another her executors, but makes no diſpoſition of the reſidue of her property.—Mr. MURRAY's OPINION, Whether the executors, or the next of kin, were entitled to it?

ONE Rebecca Jones, widow, deceaſed, by her laſt will (among other legacies) gave to her couſin Ann Eaton 10l. to be paid her upon the death of her ſiſter Mary Nunnerley, alſo deceaſed, who alſo made her will in the words following: "In the name of God, Amen: I Mary "Nunnerley, of, &c. being aged and infirm in body, "but of ſound and perfect underſtanding, do make this "my laſt will and teſtament in manner following. And "firſt, I give and bequeath to my ſervants John Bright "and Elizabeth Auſtin the ſum of 5l. a-piece (here other "legacies are given). And I nominate and appoint the "above-named John Bright and Mr. Robert Sandland, "executors of this my will, hereby revoking, &c. And "I confirm and order my executors to perform the con-"tents of my late ſiſter's will. In witneſs, &c"

Now the ſurplus is claimed by the executors, under pretence, that as one of them hath no legacy given him, he hath a right to a ſhare of the *reſiduum*, and that gives the other a right to claim; and that teſtatrix, at the time of making her ſaid will, declared that ſhe would give nothing to Ann Eaton, or any of her own relations (the latter the executors pretend to prove by parole evidence to be given by one mr. Lloyd, who drew ſaid will).

SOON after mrs. Nunnerley's death, the executors, in conſideration of the ſaid 10l. legacy, got from Eaton a general releaſe, which they pretend excludes her of the ſurplus. The ſaid releaſe was given with a view to extinguiſh the legacy only, and not to bar her of the reſidue.

EATON being a pauper, and conſequently not able to conteſt with the executors, one Lewis (pretending to be a relation of mrs. Nunnerley's and Eaton's, under that colour) drew Ann Eaton into articles, and into a letter of attorney, authoriſing him to ſue ſaid executors to account for the reſidue, and that the ſame, when recovered, ſhould be equally divided between ſaid Lewis and Eaton: but Lewis, after having ſaid articles executed, neglected to proceed according to his authority.

Quære.

WHETHER Ann Eaton, as next of kin, be not entitled to the reſidue, notwithſtanding the general releaſe by her given? and, Whether Lewis be not in danger of being indicted or puniſhed for extorting ſuch articles from Eaton, if he refuſes to deliver up the ſame without being paid for his

his trouble, which he ſeems to inſiſt upon? and, Whether the articles be valid without any conſideration?

Anſwer. If the releaſe of Ann Eaton was out of the caſe, I am of opinion, upon the above ſtate, that in this Caſe the executors are not truſtees for the next of kin, but entitled to the reſidue to their own benefit.

May 25, 1754. *W. M.*

Case. 4. A perſon ſeiſed in fee of copyhold lands contracts for the purchaſe of other copyhold eſtates, but no ſurrender is made. He afterwards, by a codicil not atteſted ſo as to paſs real eſtates, and without having made any ſurrender to the uſe of his will, deviſes both theſe eſtates to one for life, and charges them with a ſum for younger children.—Mr. Fazakerley's Opinion, Whether the teſtator's executors were compellable to carry the contract into execution? and, Whether the copyhold eſtate was effectually deviſed and charged? with a reply to other queſtions ariſing upon the Caſe.

THOMAS FEARNES being ſeiſed to him, his heirs and aſſigns, of a meſſuage and tenement, being a copyhold eſtate of inheritance, in the manor of Waverтree, containing eighteen acres of land, did, in the year 1725, ſurrender the ſaid eſtate to Margaret Watkinſon, widow, her executors and adminiſtrators, for the term of one thouſand years, ſubject to and redeemable upon payment of 200l. and intereſt. The ſaid Margaret Watkinſon, after the mortgage-money became liable, on the 28th of March 1727 ſurrenders the ſaid eſtate to Joſeph Shaw, ſince deceaſed, and John Martindale, their executors and adminiſtrators, for the remainder of the ſaid term of one thouſand years, for ſuch truſts and purpoſes as in an indenture bearing equal date with the ſaid laſt ſurrender, and made between the ſaid Margaret Watkinſon of the firſt part, George Fearnall of the ſecond part, and ſaid Shaw and Martindale of the third part, and which was a ſettlement made upon and previous to her marriage with George Fearnall, whereby ſhe was impowered to diſpoſe of her perſonal eſtate, notwithſtanding her coverture by her will or deed. She the ſaid Margaret and her truſtees lent the ſaid Fearnes the further ſum of 250l. being other part of the ſaid Margaret's ſeparate perſonal eſtate; and for the ſecuring the repayment thereof, with intereſt, the ſaid Fearnes, by his ſurrender duly acknowledged, 12th November 1728, reciting the ſaid former ſurrender, did ſurrender all the ſaid copyhold eſtate, containing eighteen acres, unto and to the uſe and behoof of the ſaid Shaw and Martindale, and their heirs and aſſigns, redeemable on payment of 450l. and intereſt. On the 12th

day

day of February following, the ſaid Margaret Fearnall, according to her power, appointed and diſpoſed of her perſonal eſtate to ſeveral perſons named in her deed of appointment, and is ſince dead.

21ſt Auguſt 1731. The ſaid Thomas Fearnes and Arthur Hamilton of Liverpool, came to an agreement, that he, the ſaid Thomas Fearnes, ſhould ſell to the ſaid Hamilton four cloſes of land, which were part of the ſaid mortgaged eſtate, called the Town Meadow before ſaid Fearnes's door, the Horſe Paſtures, and the Old Marled Hey at bottom of Piggow Lane; for which ſaid Hamilton agreed to pay to ſaid Fearnes 505l. 5s. 0d. and five guineas, on the 2d of February then next, and mr. Hamilton to enter on the ground at Chriſtmas next after the ſaid agreement; and this agreement was reduced into writing, and ſigned by the parties; and is in the words following, "21ſt Auguſt 1731. Contracted and agreed "with Arthur Hamilton of Liverpool, merchant, for ſell-"ing unto him, the ſaid mr. Hamilton, certain cloſes or "parcel of ground, called the Town Meadow before the "Door, the Horſe Paſtures, and the Old Marled Hey "at the bottom of Piggow Lane, for the ſum of 510l. "10s. 0d. and the ſaid mr. Hamilton to enter on the pre-"miſes at Chriſtmas next, and to pay 505l. 5s. 0d. on "the 2d of February next, and the remaining 5l. 5s. 0d. "unto the ſaid Thomas Fearnes's wife, provided the ſaid "Thomas Fearnes was not drunk a week together any "time betwixt and Chriſtmas next."——Mr. Hamilton, according to the ſaid contract, entered into the poſſeſſion of the ſaid purchaſed premiſes, and held the ſame to the time of his death.

By reaſon of ſome differences and diſputes relating to the perſonal eſtate of the ſaid Margaret Watkinſon, afterwards Fearnall, the ſaid mr. Hamilton could not get a title to his purchaſe, the ſaid truſtees in the mortgage, by reaſon of the ſaid differences, refuſing to receive the money on the ſaid mortgage, and to transfer over the ſame; and therefore the ſaid mr. Hamilton did not pay his purchaſe-money. There was not any mention made in the contract, what the ſaid mr. Hamilton ſhould pay for holding the premiſes till his purchaſe-money was paid and a title could be made. But it can be made appear, that ſome ſhort time after he was let into poſſeſſion of the ſaid purchaſed premiſes, ſeveral applications were made to him by Fearnes, and frequent diſcourſes were between them,

them, relating to the intereſt Hamilton was to pay till a title could be made him; and Hamilton upon theſe occaſions declared, he would pay intereſt for the ſaid purchaſe-money until the ſame was paid and a title could be made him. Theſe premiſes mr. Hamilton held in his own hands whilſt he lived, and laid the ſame to a larger copyhold eſtate which he had in Wavertree. Mr. Hamilton died in the month of December 1736, having firſt made and duly publiſhed his laſt will in writing, dated 1ſt June 1727 (this was before he had any real eſtate), and thereby bequeathed unto his wife 300l. and alſo bequeathed unto his eldeſt ſon Maxwell Hamilton, on his attainment of his age of twenty-one years, or marriage, the ſum of 500l.; and the *reſiduum* of his eſtate he bequeathed unto and equally to be divided amongſt his children, the ſaid Maxwell Hamilton, Archibald Hamilton, John Hamilton, William Hamilton, and Jane Hamilton, and all other children as he ſhould have at his death, payable at their reſpective ages or marriage; and directed his executors to place the ſame out at intereſt. Mr. Hamilton, by a codicil dated 17th March 1732-3 (to his ſaid will), thereby wills, in lieu of the 300l. to his wife, ſhe ſhould have 40l. *per annum* during her life paid out of his eſtate at Wavertree; which eſtate in Wavertree, after his wife's death, he directed to go to his eldeſt ſon (Maxwell Hamilton), he paying thereout 500l. to be divided amongſt his (the ſaid teſtator's) younger children; and appointed mr. Edward Trafford of Liverpool, and two others, who never acted, and one of them ſince dead, executors. There was not any ſurrender made to the uſe of his will or codicil; and this codicil was ſigned, ſealed, and delivered, before only two ſubſcribing witneſſes. Maxwell Hamilton the ſon, after his father's death, claiming as heir at law that part of the Wavertree eſtate, of the cuſtomary inheritance of which his father was ſeiſed to him and his heirs, and alſo as ſuch, or under the codicil of his father, claiming the benefit of the ſaid contract for the ſaid purchaſe of part Fearnes's, came to an agreement with his mother, Margaret Hamilton, that ſhe would have the whole of Wavertree eſtate during her life, in lieu of the proviſion made her either under the ſaid will or codicil of his father; and purſuant thereto, by his ſurrender acknowledged 21ſt January 1739, ſurrendered as well the ſaid purchaſed premiſes of Fearnes's, as alſo his ſaid other eſtate in Wavertree, to his ſaid mother for life, and afterwards

wards to himſelf, his heirs and aſſigns; upon which ſhe hath been admitted, and ever ſince been in poſſeſſion.

THE ſaid Thomas Fearnes made his will in writing, dated 12th September 1733, purſuant to a ſurrender by him acknowledged; and after taking notice of the ſaid Watkinſon's mortgage transferred over to Martindale, and alſo of the ſaid contract with mr. Hamilton for the ſum of 510l. 10s. od. he deviſes all that his ſaid eſtate ſo mortgaged to the reverend mr. William Martin, and his heirs and aſſigns, of intent that he or his heirs ſhould convey the ſaid purchaſed premiſes unto the ſaid Arthur Hamilton, his heirs and aſſigns, in conſideration of the ſaid purchaſe money which he the ſaid teſtator directed to be applied in diſcharge, or towards the diſcharge, of the 450l. and intereſt, due or to become due to the repreſentatives of the ſaid Margaret Watkinſon by virtue of the ſaid ſurrender or otherwiſe; and in caſe there ſhould be a deficiency of payment of the ſaid 450l. and intereſt after the ſaid purchaſe-money of 510l. 10s. od. ſhould be applied, then he directs the ſaid Martin the truſtee, and his heirs, to raiſe ſuch deficiency out of other parts of his ſaid eſtate; and in caſe of an overplus of mr. Hamilton's purchaſe-money, he directs the ſame ſhould be applied for the purpoſes after-mentioned; and alſo, that the ſaid Martin and his heirs, by mortgage or ſale of the other parts of the ſaid eſtate, to levy yearly the ſum of 10l. to his wife for life; and alſo for the raiſing of 200l. to the uſe of his younger children as ſhould not be his heir at law; and alſo declared, that the ſaid Martin and his heirs ſhould ſtand ſeiſed and poſſeſſed of the reſidue of the ſaid premiſes, in truſt for his only ſon Thomas Fearnes, his heirs and aſſigns; and appoints ſaid mr. Martin and his wife executors.

BY articles of agreement, dated 16th February 1733, and made between and executed by ſaid Thomas Fearnes and William Halſall, of Wavertree, whereby the ſaid Thomas Fearnes, in conſideration of 250l. did covenant and agree with the ſaid William Halſall, that the ſaid Fearnes, and all perſons intereſted, ſhould ſurrender and convey unto the ſaid William Halſall, his heirs and aſſigns, two cloſes of land, other part of the ſaid eighteen acres, in Wavertree, called the New Marled Ground, containing five acres; 100l. part of the ſaid 250l. was then paid Fearnes by the ſaid Halſall, and other part was agreed to be paid as ſoon as a good title could be made; and for that part of the purchaſe-money unpaid, which

was

was 150l. it was agreed, that the ſaid Halſall ſhould hold the ſaid cloſes ſo purchaſed, and pay yearly 7l. 10s. for the ſame being the intereſt upon which the ſaid Halſall entered into the purchaſed premiſes, and continues to hold the ſame. Shortly after this contract the ſaid Fearnes died (to wit) the 6th of June 1734; and Fearne's wife proved the will alone, the ſaid Martin not being willing to act in the executorſhip. *N. B.* Fearnes's widow afterwards marrying a perſon who became a bankrupt, the aſſignees and ſhe and her huſband ſold and conveyed the ſaid annuity of 10l. *per annum* (deviſed by her huſband to her for life) unto alderman Gildart.

MR. HAMILTON left five younger children, two of them yet under age, and a very conſiderable perſonal eſtate, over and above paying all his debts and legacies. Mr. Trafford, who is the only acting executor, is ready to pay the purchaſe-money, if he can be ſafe in ſo doing; and mr. Martin, the truſtee in Fearnes's will, is cautious, and likewiſe would be ſatisfied, how far he is obliged and may ſafely act under his truſt to perfect both theſe contracts of Fearnes's with ſaid Hamilton and Halſall; and inſiſts, as a truſtee for the benefit of Fearnes's heir at law and younger children, that intereſt ſhould be paid for the ſaid purchaſe-money of 510l. 10s. 0d. ever ſince the time late mr. Hamilton entered, according to his expreſs agreement for that purpoſe. The ſaid mr. Trafford, the executor, received the profits of the ſaid purchaſed premiſes from the time of mr. Hamilton's death to about the time mr. Hamilton's eldeſt ſon attained his age; and ſince that time mr. Hamilton's widow hath enjoyed the ſame, and now is in the poſſeſſion, under the above ſurrender from her ſon to her.

THE ſaid Martindale, truſtee for Fearnall, and her legatees having compoſed all differences betwixt them, they called for the ſaid mortgage-money of 450l. and intereſt to be paid in; but although Halſall was ready to perform his part of his contract, yet mr. Trafford could not be prevailed upon to perform mr. Hamilton's contract, not being ſatisfied how far he was obliged to do it, or whether he could be ſafe in paying it out of the ſaid teſtator's perſonal eſtate bequeathed to his children, or to whom the conveyance of the purchaſed premiſes ought to be made, Maxwell Hamilton, the heir at law, inſiſting to have it made to himſelf, notwithſtanding the ſaid ſurrender he had made to his mother for life.

MATTERS

MATTERS ſtanding thus, mr. Martindale, in 1741, brought an ejectment to recover poſſeſſion of all the eſtate under the ſaid mortgage; and being entitled to take judgment, mr. Halſall and mr. Hamilton, ſeeing they muſt be deprived of the poſſeſſion of the reſpective purchaſes, and leſt the ſaid contracts ſhould be defeated, and apprehending they were entitled under the ſaid contracts to redeem or take in the ſaid mortgages, applied to mr. Martindale, with whom an account was fairly ſtated of the principal and intereſt of the ſaid mortgage, which amounted to 7481. 14s. 9d. and 2l. 12s. 6d. coſts of the ejectment; which ſum they procured to be raiſed and paid the ſaid Martindale, and took a proper aſſignment of the ſaid mortgage, in the name of mr. William Marſh. *N. B.* It appears upon the evidence of ſeveral witneſſes, that mr. Arthur Hamilton promiſed Fearnes that he would pay intereſt for the ſaid purchaſe-money, and that the intereſt ſhould be 4l. 10s. *per cent.*

THERE are ſome objections between mr. Trafford, executor of mr. Hamilton, and mr. Maxwell Hamilton, his heir at law, ariſing upon the will and codicil of mr. Hamilton, which retard the completing the ſaid contracts.

MR. MAXWELL HAMILTON inſiſts, that his father having not made any ſurrender of his copyhold eſtate, neither of that part of which he was ſeiſed, nor of the other part which he had contracted for, the purchaſe of the ſame could not paſs by the codicil, nor could he charge either part thereby with the 500l. although it was for his younger children, that codicil being only atteſted by two witneſſes; and that in caſes where a court of equity ſupplies the want of a ſurrender in favour of younger children, the ſame are on wills executed before three witneſſes, according to the ſtatute of frauds.

ON the other hand, mr. Trafford inſiſts, on behalf of the younger children, that upon the will of mr. Hamilton (which he made before he purchaſed any part of Wavertree eſtate) it is plain, he intended the heir at law only 500l. more than his other children; and that he afterwards having laid out of his perſonal eſtate a conſiderable ſum in the purchaſe of the eſtate in Wavertree, beſides the ſaid contracted-for premiſes from Fearnes, the whole of which is of the yearly value of 60l. *per annum*; and it appears alſo from his codicil, that the eſtate of which he was ſeiſed was all he intended as an increaſe of fortune for his heir beyond any of his younger children;

therefore

therefore he added therein the charge of 500l. to his younger children on the whole eſtate, in order to take off the other 500l. given his heir at law by his will; and alſo inſiſts, that this 500l. being for the benefit of the younger children is a good charge on the copyhold eſtate, at leaſt on that part which he had contracted for, and had only an equitable truſt or intereſt in, by his codicil, although atteſted only by two witneſſes; for as a will of copyhold land made purſuant to a ſurrender hath been held good, although atteſted by one or two witneſſes; ſo a will of truſt or equitable intereſt is good without a ſurrender, though ſigned only before one or two witneſſes, according to the Caſe of Tuffnell againſt Page, *Paſch.* 1740, decreed by the preſent lord chancellor Hardwicke.

THE ſaid Thomas Fearnes, eldeſt ſon and deviſee of the ſaid Thomas Fearnes deceaſed, and the younger children legatees of the 200l. who are all infants, by their next friend have filed their bill againſt Trafford, Halſall, Hamilton, and others, for a performance of the two contracts, and to have a proper application of the purchaſe-money; but to prevent any farther proceedings and expence, which would in a great meaſure eat up the ſmall remnant of the eſtate given to ſaid Thomas Fearnes the heir at law, the parties intend to take directions in what manner and how far they ought to act in this matter without the neceſſary aſſiſtance of a court of equity; and for that purpoſe the ſame is referred for your conſideration,

N. B. THE bill in chancery above-mentioned ſtands clear of any differences between the heir at law and younger children of mr. Hamilton. But the ſame, in order to ſettle the whole, are taken in upon this Caſe.

1. Quære. TAKING the Caſe firſt clear of the objections above between the younger children and heir at law of mr. Hamilton, Is mr. Trafford compellable to pay the purchaſe-money agreed by mr. Hamilton out of the perſonal eſtate of mr. Hamilton in his hands? and, Whether is not intereſt alſo to be paid for the ſame after the rate of 4l. 10s. *per cent.* according to mr. Hamilton's promiſe? or, How otherwiſe? and, Whether the ſame is to be paid for ſo long time only as mr. Hamilton and his executors enjoyed the premiſes, or from his entry thereon, to the time the purchaſe-money ſhall be paid by mr. Hamilton's executors? if not, Who elſe ought to anſwer intereſt from mr. Hamilton's death? and, To whom ſhould the eſtate be conveyed? and, who are the proper parties to join in the ſale under

under the mortgages and wills above ſtated? and in caſe there be a ſurplus after payment of the mortgage-money from both contracts, Ought not the ſame to be paid into the hands of mr. Martin, the truſtee in Fearnes's will, towards anſwering the legacy of 200l. to the two younger children? and, Ought not mr. Martin to join in the conveyance, the ſame being expreſsly directed by Fearnes's will?

As to the above objections between the younger children and mr. Hamilton's heir at law, Is the 500l. a good charge upon him by the ſaid codicil of his father? and, Ought mr. Trafford, the executor, to retain the 500l. legacy deviſed by mr. Hamilton's will to his ſaid eldeſt ſon, for the benefit of the younger children, to anſwer the other legacy of 500l. in the codicil? or, How otherwiſe? and, What method to be taken in ſuch caſe that may oblige the children to releaſe the real eſtate of the legacy when they come of age? Should not there be ſome inſtrument between mr. Trafford and Maxwell Hamilton to fix the ſame, if the 500l. ſhould appear to be a charge upon the premiſes contracted for? and in that caſe, Ought the 500l. in the codicil to be raiſed till the death of the mother, widow Hamilton? and, Doth the ſame carry intereſt in the mean time, or not? Is mr. Maxwell Hamilton entitled to receive the 500l. given him by his father's will? and, Will that carry intereſt to the time it ſhall be paid? or Ought the ſame to be retained in the executors' hands to anſwer the younger children's legacy of 500l. in the codicil, or not? and if the 500l. legacy to Maxwell Hamilton carries intereſt, Ought not the ſame to be anſwered to him ſince the death of the father, or from the end of the year after his death?

2 Quære.

THEN as to the aſſignment of mr. Martindale's mortgage in 1741, intereſt is demanded for the principal and intereſt then due, and paid off upon the tranſfer of that mortgage.

ON the heir at law of Fearnes's behalf it is inſiſted, that as he is an infant, he did not, nor could do, any act to make the intereſt principal; and therefore the aſſignee ought not to charge any intereſt upon the arrear of intereſt paid off at that time.

ON the other hand the parties intereſted under the contracts for the purchaſe made with Fearnes obſerve upon the words of his will, that he directs the mortgage to be paid off with all intereſt then due or to become due; alſo, that by virtue of the ſaid contracts they had an equitable

intereſt in the premiſes, ſubject to the ſaid mortgage, and had therefore a right to redeem and take it in; that they were compelled to it, or otherwiſe muſt loſe the poſſeſſion.

That theſe infants of Fearnes's had no manner of other fortune or ſubſiſtence than from the remains of the eſtate unſold, out of the profits of which they have been all along maintained; and if the mortgagee had entered, they would have been deprived of it. And that theſe are the ſame equitable circumſtances, are ſtronger than the Caſe of the earl of Cheſterfield and lady Cromwell, reported in Abridged Caſes in Equity, 287; and ſee the other Caſes under that head of Intereſt.

3 Quære. Will intereſt be allowed the aſſignees of the mortgage for the arrears of intereſt then really due and paid off?

4. Quære. If intereſt is to be allowed the aſſignee of the mortgage for the intereſt paid off, then as the mortgage was taken up through the default of the executors of mr. Hamilton not paying the purchaſe-money, Ought the intereſt of the increaſe of the capital, upon the aſſignment of the mortgage, to be anſwered out of the perſonal eſtate of mr. Hamilton, in favour of the infant heir at law of Fearnes?

Anſwer to First Quære. I AM of opinion, that the late mr. Hamilton's contract for the purchaſe ought to be performed, and the purchaſe-money with intereſt, after the rate of 4l. 10s. *per cent.* paid by his executors out of the perſonal eſtate from the day the principal ought to have been paid, *viz.* 2. February 1731, till payment, mr. Hamilton having had poſſeſſion according to the contract. I think, the eſtate contracted for ought to be conveyed to mr. Maxwell Hamilton's mother for life, and the remainder to mr. Maxwell Hamilton and his heirs, ſubject to the ſaid charge of 500l. according to the father's codicil: and in order to make a good title, mr. Martin, and the perſon now entitled to the legal eſtate under the ſaid mortgage, ought to join in a ſurrender to the ſaid uſes. As to the lands contracted for by mr. Hamilton, if there be a ſurplus, it ought to be paid to mr. Martin towards the 200l. for the younger children of Fearnes.

I THINK,

I THINK, the 500l. is well charged by mr. Hamilton's codicil in favour of his younger children, there being no occaſion for three witneſſes in the caſe of a copyhold eſtate. It would be prudent for mr. Maxwell Hamilton to agree to let his 500l. legacy be applied in ſatisfaction and in the place of the 500l. charged by the codicil. But if he will not agree to it, the ſtrict rule is, that mr. Trafford muſt pay mr. Maxwell Hamilton his 500l. and mr. Maxwell Hamilton muſt pay the like ſum of 500l. amongſt the younger children, according to the codicil, the copyhold being in equity duly charged therewith. But this muſt be left to mr. Maxwell Hamilton's own diſcretion; who in regard the children, or ſome of them, are under age, may probably chuſe to keep the money in his own hands, or a charge upon the eſtate, till the children be of age, when they may give proper diſcharges; for till then I do not ſee how he can have any regular diſcharge, the 500l. given by the codicil not being directed to be paid to mr. Trafford. Upon the whole, the latter method may perhaps be moſt proper; but mr. Hamilton muſt anſwer intereſt after the rate of 4l. *per cent.* to the younger children from the death of the father; for the only reaſon for not paying it is, the infancy of the children, who are not proper to be intruſted with the money; but the intereſt was veſted in the younger children on the father's death. Anſwer to Second Quære.

MR. MAXWELL HAMILTON'S legacy will carry intereſt after the rate of 4l. *per cent.* from the time he attained his age of twenty-one. *N. B.* If any of the younger children be of age, mr. Maxwell Hamilton ought to pay them their ſhares of the 500l. taking releaſes from them reſpectively; and the like of the reſt, as they come of age.

NO intereſt will in this caſe be allowed for the arrear of intereſt, but intereſt for the principal ſum will only be allowed. Anſwer to Third Quære.

Anſwer to Fourth Quære

I THINK it clear in this caſe that no intereſt will be allowed for the arrear of intereſt, which puts an end to this queſtion.

9th January 1743. N. FAZAKERLEY.

CASE. 5.

A teſtatrix, by her will, ſigned and atteſted, bequeaths divers pecuniary legacies to her children and grandchildren. She after, by a paper in her own handwriting, neither ſigned nor dated, but, from indiſputable circumſtances, apparent on the face of it, written long after her firſt will, revokes all other wills, and diſpoſes of her property in a manner totally different from her former will.—The ſeveral OPINIONS of Dr. ANDREW, Dr. STRAHAN and Dr. LEE, upon the validity of the latter inſtrument, and upon the conſtruction of the word "Chattels."—A female ſervant of the ſame teſtatrix having made an affidavit, after the aforeſaid Opinions were given, of having been deſired by her miſtreſs, about a year before the latter's death, to ſign her name to the firſt will of the teſtatrix—The ſeveral Opinions of the ſame Gentlemen, Whether admitting the validity of the laſt will, this circumſtance would amount to a republication of the firſt?

"IN the name of God. *Amen*. I Mary Richmond, of "Liverpool, do make and ordain this my laſt will and "teſtament in manner following, and do hereby revoke all other wills. *Imprimis*, I give, deviſe, and bequeath "unto my ſon Silveſter Richmond, Rector of Walton, "all that farm known and called by the name of Diglake, "near Walton, now in his poſſeſſion: I likewiſe give "him one hundred pounds. I give to my grandſon "Richard Richmond two hundred pounds. I give to my "grandſon Silveſter Richmond one hundred pounds of "lawful Britiſh money: I give half of my plate, my dia-"mond ring, my ſkreen to him and his heirs for ever. "*Item*, I give, deviſe, and bequeath to my ſon-in-law "Samuel Powell of Liverpool, merchant, the ſum of one "thouſand pounds. *Item*, I give, deviſe, and bequeath to "my daughter Elizabeth Powel five hundred pounds, to "diſpoſe of to her children as ſhe thinks fit. I give to my "grand-daughter Elizabeth Powel three hundred pounds. "I give to my grand-daughter Mary Powel one hundred "pounds. I give to my grand-daughter Sarah Powel one "hundred pounds of like money. The other half of my "plate, and all my houſhold goods and chattles whatſo-"ever I give to Samuel Powel and his heirs for ever. I "do hereby appoint the ſaid Silveſter Richmond and Sa-"muel Powell to be my executors. In witneſs whereof "I have hereuntoput my hand and ſeal this fourteenth "day of Auguſt 1730.

"MARY RICHMOND."

SEALED

"SEALED, ſigned, and publiſhed by the ſaid Mary "Richmond, in the preſence of us who have hereunto "ſubſcribed our names in her preſence, and at her re- "queſt,

"WM. HOUGHTON.
"ANNE SHAW.
"MARY GUY."

"IN the name of God. *Amen.* I Mary Richmond, of "Liverpool, do make and ordain this my laſt will and "teſtament in manner following, and do hereby revoke "all other wills. *Imprimis*, I give, deviſe, and bequeath "unto my ſon Silveſter Richmond, Rector of Walton, all "that farm known and called by the name of Diglake, "near Walton, now in his poſſeſſion: I likewiſe give "him four hundred pounds. I give to my grandſon "Richard Richmond one hundred pounds. I give to my "grandſon Silveſter Richmond one hundred pounds. I "give to my grand-daughter Mary Richmond one hun- "dred pounds of lawful Britiſh money. I give half of my "plate, my diamond-ring, my ſkreen to my ſon Silveſter "Richmond and his heirs for ever. *Item*, I give, deviſe, "and bequeath to my ſon-in-law Samuel Powell of Li- "verpool, merchant, two thouſand pounds, as I promiſed "at marriage. I give to my grandſon Folliot one hun- "dred pounds. I give to my grandſon Samuel Powell one "hundred pounds of like money; the other half of my "plate to Elizabeth Powell; and goods and chattels to "my daughter; my rings and lockets to my grand- "daughters.

THE ſecond will is written by the teſtatrix herſelf. It is not ſigned, nor any ſubſcribing witneſſes to it: it is not dated either, but it carries undeniable evidence in itſelf that it was made and wrote by her long after the ſaid former will made in the year 1730, for that the teſtatrix's grand-daughter Mary Richmond, and her grandſons Folliot and Samuel Powell, legatees in the above latter will, were none of them born then, long after the making of the above former will in 1730: And for her increaſing of her perſonal eſtate, as appears by the latter will to be 500l. more than in the former, it is preſumed ſhe made this ſecond will not long before her death, which happened the latter end of May laſt, when both theſe wills, which were both wrote by the teſtatrix, were found written by her.

As to the real eſtate, as well as perſonal eſtate of the teſtatrix, the ſame came to her by the will of her late huſband

husband Mr. Richmond; but as her son, Mr. Silvester Richmond, named in both wills, is heir at law to both father and mother, and the real estate being intended for him by both wills, that matter of the real estate is out of the question.

And therefore the personal estate is the only matter in question under these two wills. Mr. Powel, who married the testatrix's only daughter, insists that, as the first will is signed by the testatrix, and properly attested, it is the only good will for the personal estate, and is not revoked by the second, which wants those ceremonies.

Mr. Richmond conceives that the last mentioned will being made subsequent to the other, and all wrote by the testatrix's own hand, is properly a will signed by her; and as it carries in itself evidence of its genuineness and veracity, there needs not any witnesses with regard to the personal estate to make it a good will in writing; and being a will sufficient to pass a personal estate, and a latter one, it necessarily revokes the former: besides, there are express words of revocation in the latter will.

1 Quære. Is the latter a good will to pass the personal estate? and if so, Who hath the right of the probate of it?

Dr Strahan's Answer to First Quære. I TAKE this last will to be a good will to pass the personal estate; and I think the administration of the deceased's effects, together with this last will, or testamentary schedule annexed, ought to be granted to Elizabeth Powell, the daughter of the testatrix, and the residuary legatee named in the last will.

Doctors Commons, WILL. STRAHAN.
July 14, 1744.

Dr. Andrew's Answer to First Quære. THE latter will seems to be an unfinished will, the deceased not *having proceeded to the appointment of executors,* as she had done in the former; she having wrote her name at the beginning is by law signing where it is required; but signing, sealing, or witnesses, are not necessary in wills for personal estates, and the operation of the clause of revocation will depend upon the validity of the will, and can have no effect unless the latter will be good. Unfinished wills are attended with uncertainty, or chiefly depend on circum-

circumſtances, from whence it may be preſumed that ſhe would have compleated the ſame, but was prevented. The preſent caſe is very doubtful; for on the one hand it may be preſumed ſhe had altered her former intention, from an increaſe of her fortune, and was willing to provide for her relation who could not be benefitted under the firſt will. On the other ſide, as ſhe has deviſed her real eſtate to her ſon, her not proceeding to complete it, as the law requires, by a due execution, ſhe may be preſumed to have departed from her intention. Unleſs it can be proved to have been wrote very near the time of her death, or the continuance of her intention can be proved by circumſtances, I am inclined to think that the firſt will is not thereby revoked, but will take place.

Doctors Commons, J. ANDREW.
June 16, 1743.

THE latter will being complete as to the intention, I am of opinion, it is a revocation of the former, and is a good will for the perſonal eſtate. And as it is all wrote by the teſtatrix, and her name is inſerted in the beginning of it, I conceive it is ſufficiently ſigned within the Statute of Frauds. As no executor is named, an adminiſtration, with the will annexed muſt be granted, which I think will be granted to the teſtatrix's daughter, who, I apprehend, is made reſiduary legatee in the latter will.

Dr. LEE's Anſwer to Firſt Quære.

GEO. LEE.

DOTH the words "all my houſhold goods and chattels," mentioned in the firſt will (if that be a good will, and not revoked), or the words "goods and chattels to the daughter," in the ſecond will (if that be a good one), paſs the *reſiduum* of the teſtatrix's perſonal eſtate not particularly diſpoſed of?

2 Quære.

IF the firſt will had ſtood good, and had not been revoked by a ſubſequent will, I conceive the words "all "my houſhold goods and chattels," mentioned in the firſt will,

Dr. STRAHAN's Anſwer to Second Quære.

will, would have entitled the legatee therein named to the whole undeviſed reſidue of the perſonal eſtate. And the words "goods and chattels to the daughter," in the ſecond will, will entitle the daughter to the *reſiduum* of the perſonal eſtate not particularly diſpoſed of.

WILL. STRAHAN.

Dr. ANDREW's Anſwer to the Second Quære.

THE words "all my houſhold goods and chattels "whatſoever" do not comprehend the debts, if any were due to the deceaſed at the time of her death. If the former will ſhall ſtand good, they will, I conceive, in this caſe, go to the executors; but if the latter be valid, they will be diſtributable, and the ſon will be intitled to an adminiſtration, with the ſaid will or teſtamentary ſchedule annexed.

Doctors Commons, J. ANDREW.
June 16, 1743.

Dr. LEE's Anſwer to the Second Quære.

THE words "goods and chattels" are very extenſive, and I apprehend, are ſufficient in either will to convey the reſidue of the perſonal eſtate not ſpecially bequeathed.

GEO. LEE.

Additional Caſe on Mrs. Richmond's will.

An ADDITIONAL CASE *on* Mrs. RICHMOND's WILL.

1. Quære.

SUPPOSING the firſt will ſtands good, as mrs. Richmond the teſtator had in bonds and other ſecurities to the amount of 500l. more than her debts and legacies, Will the words in the firſt will, *viz.* "all my houſhold-goods "and chattels," paſs the *reſiduum* undeviſed to the legatee in that will? or, Will the ſame be diſtributable betwixt

twixt the teſtatrix's next of kin, which are mr. Silveſter Richmond and mrs. Powell, her ſon and daughter?

IN Caſe the firſt will ſhould ſtand good, I apprehend the words in the ſaid firſt will (*viz.* all my houſehold goods and chattels) would paſs the *reſiduum* of the perſonal eſtate undeviſed to the legatee in the ſaid will named; and that the ſame would not be diſtributable between the teſtatrix's next of kin. Dr. STRAHAN's Anſwer to the Firſt Quære.

WILL. STRAHAN.

THE Caſe upon which I grounded my opinion, "That "debts due and owing to the teſtator at the time of his "death were not comprehended under the words 'houſe-"hold-goods and chattels,' and that conſequently the "whole reſidue was not deviſed," was the Caſe of Sparkes againſt Denn, in ſir William Jones's Reports, p. 225, where it was determined, that debts were not comprehended under the deviſe of chattels by the court of delegates. But as the eccleſiaſtical court will not be permitted to diſtribute an undeviſed reſidue where a teſtator has made an executor, but only in caſes of inteſtacy, and prohibitions have been granted thereupon, and this point muſt be determined upon application to the court of chancery, it will be more adviſeable to be directed therein by the learned gentlemen who are exercent in that court. In caſe the diſpute had been upon the grant of an adminiſtration, as it was in the above-mentioned caſe, it would have been determinable only in the eccleſiaſtical court. Dr. ANDREW's Anſwer to the Firſt Quære.

J. ANDREW.

COPY *of an* AFFIDAVIT *of* MARY GUY, *late* Servant *of* Mrs. RICHMOND.

"MARY GUY of Liverpool, ſpinſter, maketh oath: "That ſhe was at the time of Mrs. Mary Richmond, late "of Copy of Mary Guy's Affidavit.

" of the ſame place, widow, ſervant maid to the ſaid mrs. " Richmond, and had continued ſo for the ſpace of three " years and an half, or thereabouts. Saith, That about " twelve months before the death of her ſaid miſtreſs, as " near as ſhe this deponent can recollect as to the time, " ſhe was ſet attending her miſtreſs in her bed-chamber in " the houſe of mr. Samuel Powell; and ſhe then went to " her cabinet and took thereout a paper writing, now " produced to this deponent, and which appears to be a " will of her ſaid miſtreſs, and to bear date the 14th day " of Auguſt 1730; and thereupon her ſaid miſtreſs " brought the ſaid paper writing to the table in the ſame " room, and called this deponent to her, and ordered her " to put her name to the ſaid paper writing, which this de- " ponent accordingly did: and ſaith, that the name 'Mary " Guy' thereto ſubſcribed is this deponent's hand-writing. " Saith, that the ſaid paper writing lay open whilſt ſhe " ſo ſubſcribed her name, but ſhe did not read the ſame, " nor know what it was; nor did her ſaid miſtreſs ac- " quaint her that it was her will, or made uſe of any words " whatſoever to ſignify to this deponent that it was her " will; nor did ſhe acknowledge the ſame, or her name " thereto, to be her hand-writing, or in any other manner " tending thereto; nor did ſhe ſay any thing about it, " ſave that at the time this deponent ſubſcribed her name " thereto as aforeſaid, her ſaid miſtreſs ſaid, 'There is " poor Ann Shaw's name; and you,' meaning this depo- " nent, 'ſhall pay nothing, for ſhe had done,' or to that " effect. Saith, She obſerved her looking at the ſaid pa- " per writing, and ſhe had it before her ſome time after " this deponent had ſo ſubſcribed her name; and after- " wards by the order of her ſaid miſtreſs, ſhe put it up in- " to the drawer of the cabinet from whence her ſaid miſ- " treſs had before taken it, and locked it up, and brought " her ſaid miſtreſs the key. Saith, That during this tranſ- " action there was not any body preſent in the room but " this deponent and her ſaid miſtreſs. Saith, The next " time ſhe ever ſaw the ſaid paper writing was the day " after her ſaid miſtreſs died. Saith, That ſhe this depo- " nent often afterwards ſaw her ſaid miſtreſs writing, but " never obſerved, or was ever acquainted by her, that ſhe " was writing: nor doth ſhe remember ſhe ever ſaw the " other paper writing, purporting to be a will of her ſaid " miſtreſs, before this day of her examinion.

" MARY GUY."

WHETHER

WHETHER upon the circumſtances in this affidavit, it will amount to a republication of her firſt will? 2 Quære.

AS the teſtatrix did not upon the occaſion make any declaration of her intention to revive and republiſh her firſt will, I do not think what was done will amount to a republication of her firſt will, which had been expreſsly revoked by a ſubſequent will. Dr. STRAHAN's Anſwer to the Second Quære.

Doctors Commons, WILL. STRAHAN.
July 14, 1744.

THIS cannot, I think, have much effect in the preſent Caſe; for if the latter unfiniſhed will was wrote more than twelve months before her death, and was left ſo at the time of her death, it would not revoke the former, though it were executed only in the preſence of two witneſſes. But in caſe it had wanted a republication to ſupport it, it would, I think, amount to a republication. Dr. ANDREW's Anſwer to the Second Quære.

Doctors Commons, J. ANDREW.
11*th April,* 1744.

N. B. AND if ſo, I am directed to beg the favour of yourſelf and dr. Andrew to conſult together upon the ſecond *Quære* in the Firſt Caſe, as all parties propoſe it, before you write your Opinions on this Second Caſe and *Quæries*.

I HAVE talked with dr. Andrew upon the ſubject of this *Quære*; and ſince it is uncertain whether the point touching the diſtribution of a reſidue undeviſed in an executed will, where there is an executor, may be determined in the court of chancery, or left to the deciſion of the eccleſiaſtical court, I think it will be adviſeable for the parties to take the opinion of ſome of the learned Counſel who practiſe in that court, where the caſe is moſt likely to be determined. Dr. STRAHAN's OPINION on the Second Quære in the Firſt Caſe.

Doctors Commons, WILL. STRAHAN.
September 19, 1744.

FINDING

Dr. Lee's Opinion upon Mrs. Richmond's Second Case, given after the peruſal of Dr. Strahan's and Dr. Andrew's Opinions on both Caſes.

FINDING that two gentlemen of great experience and ability have entirely differed in their Opinions upon this Caſe, and having formerly given an Opinion upon it myſelf in favour of the latter will, I have fully reconſidered it, and think it is a matter of a good deal of doubt and difficulty: but upon the beſt judgment I can form, and upon the authority of ſome late Caſes, I am now of opinion the firſt will muſt take place. There being a deviſe in the laſt will of a real eſtate, mrs. Richmond muſt be preſumed to have intended to have executed it, becauſe every teſtator is preſumed to intend the ſeveral deviſes in his will ſhould take effect, and is preſumed to know the legal requiſites for that purpoſe. That being the caſe, her not carrying it into execution will be deemed a departure from it, unleſs it can be proved ſhe died before ſhe had convenient time to do it. As to the clauſe of revocation in the laſt will, if the will itſelf does not ſubſiſt, it can have no effect; for it was not intended as a ſpecial revocation of the former will, but only upon the condition of making a ſubſequent ſubſiſting will.

I think, alſo, that the firſt will is ſupported by the affidavit of Mary Guy; for if the teſtatrix deſired her to witneſs it after writing of the laſt will, it ſhews ſhe then conſidered it as her laſt will, and intended it ſhould ſtand as ſuch; which I conceive is a ſufficient republication.

The words "all my houſehold goods and chattels" in the firſt will, and the words "goods and chattels to the daughter" in the laſt will, I apprehend, are by the civil law extenſive enough to carry the whole reſidue of the undeviſed perſonal eſtate: but I find the determinations at common law have been, that debts, obligations, and the like, are not comprehended in the words "goods or chat-"tels;" and as this point muſt be determined by the rules of that law, I am of opinion, the undeviſed reſidue will, in caſe the firſt will ſubſiſts, go to the executors therein named:

named: but if the latter will ſhall ſubſiſt, I think ſhe is inteſtate as to the reſidue; and it will be diſtributable to her next of kin. And as the daughter is not reſiduary legatee, I conceive the adminiſtration with the will annexed will be granted to mr. Silveſter Richmond; for where the intereſts are equal, it is the rule in the eccleſiaſtical court rather to grant adminiſtration to a man than to a *feme covert*.

Doctors Commons, GEO. LEE.
September 5, 1745.

CASE. 6.

WILLIAM MARSH the elder, by will of that date, gives his meſſuage wherein he then inhabited, and the lands thereto belonging, and all and every his lands of inheritance in Knowſley, and all his meſſuages and lands in Preſcot, charged and chargeable as thereinafter is mentioned, to his ſon William Marſh and James Honnion, and their heirs, in truſt, for the uſe of his ſaid ſon William Marſh, for his life, *ſans waſte*; and from and after his deceaſe, to and for the uſe of ſuch his the ſaid teſtator's grandchildren, Henry, William, Thomas, Sarah, and Elizabeth, Marſh (children of the ſaid William Marſh the ſon), for ſuch eſtates, terms, and intereſt, and in ſuch ſhares and proportions, and charged and chargeable in ſuch manner as his the ſaid teſtator's ſon William Marſh, by any deed to be by him executed in the preſence of two or more credible witneſſes, or by his laſt will and teſtament in writing, to be by him executed in the preſence of three or more credible witneſſes, ſhould direct, limit, deviſe, or appoint (ſo as the ſaid meſſuages and lands, or any part thereof, ſhould not be directed, limited, deviſed, or appointed, or made chargeable with any ſum of money by his the ſaid teſtator's ſon William to any perſon whatſoever, except to, or to the uſe of his the ſaid teſtator's grandchildren, or to ſome or one of them); and for want of ſuch direction, limitation, deviſe, or appointment, to the uſe of the heirs of the body of the ſaid teſtator's ſon William Marſh, begotten upon the body of Margaret his late

15. Dec. 1720.

late wife deceaſed (his the ſaid teſtator's meſſuage and lands in Knowſley to be chargeable, and he did thereby charge the ſame with the ſum of 200l. to be paid within two years after the death of) his ſaid ſon by ſuch of his ſaid grandchildren to whom his ſaid ſon ſhould direct, limit, deviſe, or appoint, the ſame meſſuages and lands as aforeſaid, or to whom the ſame ſhould deſcend or come by virtue of his the ſaid teſtator's will, to or to the uſe of all other his ſaid grandchildren, equally to be divided amongſt them): and for want of ſuch iſſue, the ſaid meſſuages and lands to be to and for the uſe of the right heirs of the ſaid William Marſh for ever. And after giving ſeveral other legacies to his ſaid grandchildren, and to ſeveral other perſons, he the ſaid teſtator directs, that if any of his grandchildren, Henry, William, Thomas, Sarah, and Elizabeth Marſh ſhould die without iſſue before he ſhe or they ſhould attain the age of twenty-one years, then the part or ſhare of the ſaid ſeveral and reſpective legacies and charges of him, her, or them, ſo dying, ſhould ſurvive, and be paid to the ſurvivor or ſurvivors of his ſaid five grandchildren, equally to be divided amongſt them.

2. Dec. 1719. THE teſtator died ſoon after making the ſaid will. By a deed of that date, made between the ſaid William Marſh the ſaid teſtator's ſon of the firſt part, Alice Leadbeater, widow, of the ſecond part, and William Dickaſon of the third part, and executed by the ſaid William Marſh and Alice Leadbeater, it is recited, that whereas a marriage was intended to be had between the ſame William Marſh and the ſaid Alice, in conſideration thereof, and of other ſum or ſums of money, yearly rents and profits to her belonging, and for other good and valuable cauſes and conſiderations, he the ſaid William Marſh the ſon did covenant, promiſe, and agree to and with the ſaid William Dickaſon, that he the ſaid William Marſh the ſon would, within twelve months next after the ſaid marriage, well and ſufficiently grant and aſſign over to the ſaid William Dickaſon, his executors and adminiſtrators, ſome or out of ſome eſtate or eſtates lately purchaſed by the ſaid William Marſh, or as in the time thereby limited ſhould by him be purchaſed, the yearly rent of 20l. of intent that the ſaid *W. D.* his executors and adminiſtrators, ſhould ſtand and be ſeiſed of the ſame, to the uſe of the ſaid Alice and her iſſue, as ſhould be begotten by the ſame William Marſh. And to the end the ſame William Marſh might be ſure that the ſaid Alice, if ſhe ſhould ſurvive him, ſhould

not

not challenge or claim any dower of the inheritance or perſonal eſtate of the ſame William Marſh that he at that or at any other time thereafter was or ſhould be poſſeſſed of, nor ſuch perſon or perſons to whom he ſhould make any eſtate for years, life, lives, in tail or in fee-ſimple, of all or any part of his inheritance, ſhould be diſturbed or inquieted in the peaceable or quiet occupying or enjoying of the ſaid inheritance, or of any part or parcel thereof, ſhe the ſaid Alice, in conſideration of the ſaid 20l. *per annum*, to be ſettled as aforeſaid by theſe preſents, effectually is barred and excludes herſelf of and from her dower to be had of any of the lands, tenements, goods, or chattels, of the ſame William Marſh.—Soon after the execution of this deed the marriage was ſolemnized.

THE ſaid William Marſh the ſon, by his will of that date, reciting that he had that day ſurrendered his cuſtoms, meſſuages, and lands, in Preſcot, to the uſe of ſuch perſon and perſons, and for ſuch eſtates as he by his laſt will and teſtament, to be executed in the preſence of three or more credible witneſſes, ſhould deviſe, declare, direct, or appoint, thereby deviſes, declares, directs, and appoints, all thoſe his meſſuages and tenements in Preſcot, then in the poſſeſſion of Alice Gervas, Iſabel Whitlow, Iſaac Dyſon, Henry Forber, Martha Parr, Joſiah Burgeſs, Nathan Button, and the meſſuage in the poſſeſſion of James Fairbrother, and the building late in the poſſeſſion of Richard Tatlock, and the meſſuage, tenement, and lands, in Knowſley, which late were the inheritance of his father William Marſh, and the ſaid teſtator thereby alſo gives and deviſes the meſſuage and tenement called Barrowfield-houſe in Eccleſton, and all his lands of inheritance in Eccleſton aforeſaid (charged and chargeable as thereinafter mentioned), to the following uſes: that is to ſay, to the uſe of his ſaid teſtator's ſon *William Marſh* for his life, *ſans waſte*; and from and after the determination of that eſtate, to the uſe of his the ſaid teſtator's executors, and their heirs, during the life of him the ſaid teſtator's ſon William, in truſt to preſerve the contingent uſes thereinafter limited: and from and after the deceaſe of the ſaid teſtator's ſon William, to his firſt and other ſons in tail male: and for want of ſuch iſſue, to the uſe of his the ſaid teſtator's ſon Thomas for his life, *ſans waſte*; remainder to the teſtator's executors and their heirs, to preſerve contingent remainders; remainder to the firſt and other ſons of the ſaid Thomas in tail male; remainder to the daughters of

15. Nov. 1722.

Dead *ſans* iſſue.

of the ſame teſtator's ſaid ſon William in tail general; remainder to the daughters of the ſame teſtator's ſon Thomas in tail general: and for want of ſuch iſſue, to the uſe of his the ſame teſtator's daughters Sarah and Elizabeth Marſh, for their lives, without impeachment of waſte; and after the determination of the ſaid eſtates for lives of his the ſaid teſtator's daughters, to the uſe of his the ſaid teſtator's executors, and their heirs, during the lives of the ſaid daughters, in truſt to preſerve the contingent remainders: and from and after the deceaſe of his the ſaid teſtator's daughters, to the uſe of the heirs of the bodies of his the ſaid teſtator's daughters lawfully to be begotten: and for want of ſuch iſſue, to ſuch pious or charitable uſes, as his the ſaid teſtator's executors, or the ſurvivor of them, his heirs or aſſigns, ſhould think fit to apply or diſpoſe of the ſame.

NOTE, That part of the ſaid eſtates deviſed by the ſaid William Marſh the ſon are the ſame which are hereinbefore mentioned to be deviſed by his ſaid father's will; the ſaid teſtator William Marſh the ſon by his ſaid will reciting, that whereas he was ſeiſed or poſſeſſed of a meſſuage, tenement, and lands in Knowſley Park, for a term or number of years then in being, and of the cloſes of land in Eccleſton called the Daverſt, and a well, croft, and garden, lying in the ſaid Park, and of the herbage of the land leading to William Crouchley's, for the term of ſome lives then in being, and of a meſſuage in Preſcot in the poſſeſſion of John Parr, for three lives, or for ſome term of years determinable upon three lives; he the ſame teſtator doth by his ſame will deviſe, declare, direct, and appoint, the ſame laſt mentioned meſſuages and tenement (charged and chargeable as thereinafter is mentioned) unto his ſaid ſon William Marſh, his heirs, executors, adminiſtrators, and aſſigns, during all his the ſame teſtator's reſpective eſtates, terms, and intereſts therein: and the ſaid teſtator doth thereby charge and make chargeable all and every his ſaid meſſuages tenements, lands, and hereditaments, with the clear yearly rents or ſums of 10l. a-piece, to be paid to his daughters Sarah and Elizabeth during their reſpective lives.

NOTE, That the ſaid William Marſh the ſon, at the time of making his ſaid will, held part of the ſaid laſt mentioned lands, ſo given to his ſon as aforeſaid, by virtue of a leaſe from the Derby family for three lives; but the ſame teſtator, ſoon after the making of his will, exchanged the

the ſame with the ſaid earl of Derby, who thereupon, by a leaſe dated 24th January 1723, demiſed other lands in Eccleſton and Knowſley in lieu thereof to the ſame teſtator, to hold to him, his heirs, and aſſigns, for the term of three lives: and the other lands mentioned in the ſaid laſt mentioned deviſe are terms for years, determinable upon lives.

THE ſaid teſtator William Marſh the ſon by his ſaid will, reciting, that he was ſeiſed of a meſſuage and lands in Knowſley called Long Borrow, and another meſſuage and lands there in the poſſeſſion of James Preſcot, and of another meſſuage and lands there in the poſſeſſion of Thomas Bramhill, and of the new marked ground then joined therewith, and a meſſuage and lands in Eccleſton, in poſſeſſion of Henry Gover and Mathew Roughley, by virtue of ſeveral leaſes thereof, made for ſeveral lives then in being; doth thereby give and deviſe the ſame meſſuages, tenements, lands, and premiſſes; and doth thereby alſo deviſe, declare, and appoint, all and every his meſſuages and tenements in Preſcot aforeſaid, in the poſſeſſion of John Sutton, Iſaac Bill, William Hetcroft, Anthony Fillingham, Henry Appleton, &c. and all other his lands and hereditaments in Preſcot aforeſaid (except what are before deviſed to his ſaid ſon William as aforeſaid), to the ſeveral uſes following: that is to ſay, to the uſe of his ſaid ſon Thomas, *ſans waſte*; remainder to his executors and their heirs, during the life of his ſaid ſon Thomas, to preſerve contingent remainders; remainder to the firſt and other ſons of his ſaid ſon Thomas in tail male; remainder to his the ſame teſtator's ſon William for life, *ſans waſte*; remainder to the ſaid truſtees and their heirs, to preſerve contingent remainders; remainder to the firſt and other ſons of his the ſaid teſtator's ſon William in tail male; remainder to the daughters of his ſaid ſon Thomas in tail general; remainder to the daughters of his ſaid ſon William in tail general: and for want of ſuch iſſue, to the uſe of his the ſaid teſtator's daughters Sarah and Elizabeth Marſh for their lives, without impeachment of waſte: and after the determination of the ſaid eſtates for lives of the ſaid teſtator's daughters, to the uſe of his the ſaid teſtator's executors, and their heirs, during the lives of his ſaid daughters, in truſt to preſerve the contingent remainders: and from and after the deceaſe of his the ſaid teſtator's daughters, to the uſe of the heirs of the body of his ſaid daughters lawfully to be begotten: and for want of ſuch

iſſue, to ſuch pious or charitable uſes as his the ſaid teſtator's executors, or the ſurvivor of them, his heirs or aſſigns, ſhould think fit to apply or diſpoſe of the ſame.

NOTE, THE meſſuage above-mentioned to be called Long Borrow, and the other meſſuages and lands in the poſſeſſion of James Preſcot, &c. and the new marked ground, are leaſhold eſtates which the ſaid teſtator William Marſh the ſon held at the time of making his will, and alſo at his death, by virtue of ſeveral leaſes made to him, to hold to him, his executors, adminiſtrators, and aſſigns, for the term of three lives, and of the ſurvivor of them; and all the reſt of the ſaid laſt-mentioned premiſſes in Preſcot are copyhold or cuſtomary lands of inheritance, which the teſtator William Marſh the ſon had ſurrendered to the uſe of his will; the ſaid teſtator William Marſh the ſon by his ſaid will reciting, that by articles before his marriage with Alice his then wife, he being obliged to ſettle 20l. a year on her and her iſſue by him, gives and appoints his mill and buildings on Lowhill within Liverpool, whereof he was ſeiſed or poſſeſſed for three lives and twenty-one years, unto his ſaid wife, and daughter Mary by her, according to his covenant in, or the intention of, the ſaid articles: and if it ſhould happen that the ſame ſhould not be ſufficient to make up the ſaid 20l. *per annum*, then he charges ſo much money as the ſame ſhall fall ſhort upon the lands which he lately bought from mr. William Marſhall, which are before deviſed to his ſaid ſon Thomas: and in caſe his ſaid daughter Mary ſhould die before ſhe attained the age of twenty-one years, or married, he gave the ſaid mill and building after his ſaid wife's death to her younger children by her former huſband, equally to be divided between them; and in caſe both of them ſhould die without iſſue in the life-time of his ſaid wife, he gave the ſame to ſuch perſon or perſons, and charged in ſuch manner as his ſaid wife by her deed or will, to be executed in the preſence of three or more witneſſes, ſhould direct or appoint.

NOTE, THE ſaid mill and buildings are now only of the yearly value of 7l. and worth to be ſold the ſum of 95l.

THE ſaid William Marſh the ſon, by his ſaid will, reciting, that he had a grant from the corporation of Liverpool of ſeveral tracts of land near the Dock, for which he had paid ſeveral conſiderable ſums of money, did thereby give and deviſe one-ſixth part thereof for the uſe of the poor ſcholars of the charity-ſchool of Liverpool, and

and to his ſaid ſons and daughters William, Thomas, Sarah, Elizabeth, Mary, and their heirs, each of them one-ſixth part thereof; and the teſtator wills and deviſes, that the ſame, or any part thereof, ſhall not be ſold or diſpoſed of, or any diviſion made thereof, by the ſaid poor ſcholars, or his ſaid ſons or daughters, or their, or any of their, heirs; and that if any of his ſaid ſons or daughters ſhould happen to die without iſſue, the ſhare of him, her, or them, ſo dying, ſhould ſurvive and go to the ſurvivors of his ſaid ſons and daughters, and their heirs, equally amongſt them; and if all his ſaid ſons and daughters ſhould happen to die without iſſue, then the whole to be for the uſe of the ſaid poor ſcholars.

NOTE, THE ſaid teſtator, William Marſh the ſon, held the ſaid parcel of land in Liverpool by virtue of a leaſe made to him, 5th day of October 1715, by the mayor, bailiffs, and burgeſſes, of Liverpool, to hold to the ſame teſtator for three lives, and the ſurvivor of them; and from and after the death of the ſurvivor of them; for twenty-one years.

THE ſaid teſtator, William Marſh the ſon, by his ſaid will directs, that all the reſt, reſidue, and remainder, of his goods, chattels, ſtock in trade, company or partnerſhip, and perſonal eſtate whatſoever, together alſo with the remainder of his rents and profits of his ſaid meſſuages, tenements, lands, and hereditaments, deviſed to his ſaid ſons as aforeſaid until their reſpective attainments of the age of twenty-one years, ſhould be put out by his executors, in truſt to pay unto his ſaid daughter Sarah the ſum of 500l. on the 1ſt day of May next after ſhe ſhould attain the age of twenty-one years; and as to the remainder thereof, which he ſhould not have further diſpoſed of in his life-time, to be further continued at intereſt till the 1ſt day of May next after his ſaid daughter Mary ſhould attain the age of twenty-one years or death; and then the ſame, together with the produce, intereſt, and increaſe thereof, to be equally divided amongſt his ſaid ſons and daughters, William, Thomas, Sarah, and Mary, if then all living; and in caſe of any of their deaths, the ſhare of him, her, or them, ſo dying, to go to his, her, or their iſſue, if there ſhould be any ſuch; and in caſe any of his ſaid ſons and daughters ſhould happen to die without iſſue, before he, ſhe, or they, ſhould attain the age of twenty-one years, then the legacy, or part, portion, or ſhare, of his ſaid perſonal eſtate of him, her, or them, ſo dying, ſhould ſur-

vive and go to the ſurvivor of his ſaid ſons and daughters, equally amongſt them.

THE ſaid teſtator appoints Thomas Fleetwood, Richard Wright, and William Crouchley, executors of his ſaid will who died in his, the ſaid teſtator's, life-time; and the ſaid will is atteſted by three witneſſes.

16th and 17th Nov. 1742. BY indentures of leaſe and releaſe of thoſe dates, the releaſe being quinquepartite and made between Samuel Jarvis of the firſt part, the ſaid teſtator, William Marſh the ſon, of the ſecond part, his ſaid daughter Sarah Marſh of the third part, Brian Blondell and another of the fourth part, and William Blondell and another of the fifth part; in conſideration of a marriage which was then intended, and which was ſoon afterwards had between the ſaid Samuel Jarvis and Sarah Marſh, and of the ſum of 2000l. by the ſame William Marſh, his heirs, executors, and adminiſtrators, to be paid to the ſaid Samuel Jarvis, his executors or adminiſtrators, the marriage-portion of the ſaid Sarah, in ſuch manner as is therein after mentioned and for making a competent jointure and proviſion for her in caſe ſhe ſhould ſurvive the ſaid Samuel Jarvis, in lieu of her dower and thirds at common law, and for ſettling the ſeveral meſſuages and lands therein-after mentioned, to the ſeveral uſes therein-after declared; and in conſideration of 5s paid to the ſaid Samuel Jarvis by the ſaid Bryan Blondell, &c. he, the ſaid Samuel Jarvis did grant and convey ſeveral meſſuages and lands therein particularly mentioned to the uſe of himſelf for life; remainder to truſtees, during his life, to preſerve contingent remainders; remainder to the ſaid Sarah for life, the ſame with other lands therein-after agreed to be ſettled to be for her jointure, and in bar of all dower which ſhe might claim out of any lands whereof the ſaid Samuel Jarvis ſhould at any time during the ſaid intended coverture be ſeiſed of any eſtate of inheritance; remainder to the iſſue of the ſaid marriage, with proviſion for the younger children of the ſaid marriage: and the ſaid Samuel Jarvis did, by the ſaid indenture of releaſe, covenant that he would, within three years then next, purchaſe, ſettle, and convey to the ſame uſes as are mentioned in the ſaid indenture of releaſe other lands of inheritance, which with the lands thereby ſettled, excluſive of the houſe therein-mentioned, ſhould be of the clear yearly value of 180l.: and the ſaid William Marſh did thereby covenant, that he would pay to the ſaid Samuel Jarvis 1000l. within twelve months next after the ſaid marriage,

marriage, and the further ſum of 1000l. at the end of two years next after the ſaid marriage, if the ſaid Sarah, or any, iſſue of her body by the ſaid Samuel Jarvis, ſhould be then living.

By indentures of thoſe dates, reciting the before mentioned indentures of leaſe and releaſe, and made between the ſame parties; and alſo reciting, that the ſaid Samuel Jarvis had purchaſed ſeveral meſſuages and lands, which with the lands mentioned in the ſaid firſt ſettlement were of much greater yearly value than the clear yearly ſum of 180l.; he, the ſaid Samuel Jarvis, did, by the ſaid indentures of leaſe and releaſe of the 28th and 29th March 1746, in purſuance and performance of his covenant in the ſaid former indenture of releaſe, continue to convey ſeveral meſſuages and lands therein particularly mentioned to the ſame uſes as are mentioned in the ſaid former ſettlement; and which ſame meſſuages and lands are, with the lands mentioned in the former ſettlement, expreſſed to be for the jointure of the ſaid Sarah, and in full ſatisfaction and in bar of her dower which ſhe might claim out of any lands whereof the ſaid Samuel Jarvis ſhould, during the coverture between them, be ſeiſed of any eſtate of inheritance; and on the back of the ſaid laſt-mentioned indenture it is declared, that the ſum of 2000l. mentioned in the firſt ſettlement had been fully paid off and diſcharged by the ſaid William Marſh, father of the ſaid Sarah, to the ſaid Samuel Jarvis. 28th and 29th March 1746.

The ſaid teſtator, William Marſh the ſon, ſoon after the marriage of his ſaid daughter Sarah, and about five years before his death it is apprehended, wrote down, with his own hands, in conſideration for a new will which was found amongſt his papers at his death, and whereby it ſeems to appear, that he intended to appoint his three daughters, Sarah, Elizabeth, and Mary, executors and reſiduary legatees; but the initial letters of his daughters names are therein only mentioned; and the ſaid paper-writing is not ſigned by the ſaid teſtator.

The ſaid teſtator, William Marſh the ſon, died the 9th of October 1747, without altering his will, dated 15th November 1722, ſave as aforeſaid; and his ſons William and Thomas both died in his life-time, without iſſue, after they had ſeverally attained their age of twenty-one years, and before the ſaid teſtator's daughter Mary had attained her age of twenty-one years; and the ſaid teſtator's ſon-in-law Samuel Jarvis died, on the 6th of February 1747,

1747, inteſtate, and without leaving any iſſue: and the ſaid teſtator, William Marſh the ſon, at his death left three children living by his firſt wife, to wit, Henry, Sarah (who married mr. Jarvis), and Elizabeth; and by Alice his ſecond wife, a daughter, called Mary, named in his ſaid will, who is yet living, and her mother.

NOTE, THE ſaid teſtator, William Marſh the ſon, did not, by his ſaid will made in 1722, give any thing to his eldeſt ſon Henry Marſh, who had greatly diſpleaſed him; but the ſaid Henry Marſh, upon the death of his father, became entitled to a real eſtate which the father had purchaſed ſubſequent to the making his will.

1. Quære. WHO will be entitled to the ſaid 200l. or any and what part thereof, which the ſaid firſt-named William Marſh the father by his will charges upon his eſtate thereby deviſed, and directs to be paid within two years next after the death of his ſon William Marſh? Will Henry Marſh, ſon of the ſaid William Marſh the ſon, be ſolely entitled to the ſame?

Anſwer. HENRY MARSH being the only one of the five grandchildren who is excluded from the eſtate charged with the 200l. I think, he is entitled to the whole 200l.

2. Quære. WILL the ſaid deed, which the ſaid teſtator William Marſh the ſon and Alice his ſecond wife executed previous to their intermarriage, bar her of her dower of any claim which ſhe can have out of the real copyhold or perſonal eſtates given the ſaid William Marſh the ſon? or, Will ſhe be entitled to any and what intereſt in the real copyhold or perſonal eſtates of her ſaid huſband? and as the ſaid eſtate given by the will of her ſaid huſband to her and her daughter Mary is only a leaſhold eſtate, and not now of the yearly value of 20l. and only worth about the ſum of 95l. to be ſold, and therefore it is apprehended that the ſaid Alice and her daughter will not accept of the ſame in full ſatisfaction of their demands under the ſaid articles, Is not ſuch ſatisfaction to be made out of the eſtate purchaſed by the ſaid teſtator William Marſh from William Marſhall, according to his the ſaid teſtator's will, or how otherwiſe, as the ſaid eſtate purchaſed from the ſaid William Marſhall is a copyhold eſtate of inheritance, and ſettled by the ſame teſtator upon his ſons and daughters amongſt his other eſtates by his ſaid will?

Anſwer. I AM of opinion, the marriage-articles, in caſe they are

are made effectual for the widow and her children's benefit, will be a bar in equity to her claim of dower out of the real freehold or copyhold eſtate, and alſo to her claim of any perſonal eſtate other than what are given her by her huſband's will. I think, the widow is entitled by the articles to a rent-charge of 20l. to her for her life, with remainder to Henry, now the eldeſt ſon, in tail. The teſtator's real eſtate which he had purchaſed before the articles is liable to make it good, and ſo is his whole perſonal eſtate, as well as the particular fund appropriated by the will; and if the covenant is for the teſtator and his heirs, all his real aſſets are alſo liable, and the widow and Henry may inſiſt on having ſuch annuity made good out of all theſe funds till a ſufficient ſecurity is made for it.

As William and Thomas Marſh, ſons of the ſaid teſtator William Marſh the ſon, both died in his life-time without iſſue, Are not Sarah and Elizabeth, the daughters of the ſaid William Marſh the ſon, entitled to the ſeveral eſtates limited to them by their ſaid father's will, in default of iſſue of their ſaid brothers? and, What intereſt have the ſaid daughters in the ſaid eſtates reſpectively? Are they not joint-tenants for life of all the freehold and copyhold eſtate of inheritance, with remainder to their iſſue of moieties thereof? and in caſe either of them ſhould die without iſſue, To whom will the moiety of ſuch of them ſo dying, after the death of the ſurvivor of them, go? Will it go to the iſſue of the ſurvivor of them by way of remainder, or will it go to ſuch charitable uſes as the heir at law of the ſurviving executor of the ſaid teſtator, William Marſh the ſon, ſhall appoint, or to the heir at law of the ſame teſtator? and, Can the ſame teſtator's daughters Sarah and Elizabeth, or the ſurvivor of them, ſuffer a recovery of the ſame eſtates, or of any and what part thereof, or do any act whereby to veſt an abſolute intereſt in themſelves? and, Will it be prudent, previous to the ſuffering a recovery thereof, to convey the ſaid lands of inheritance to ſome perſons for a term of years, if the ſaid daughters, or either of them, ſhould ſo long live, leſt they ſhould not hereafter be taken to be tenants in tail; and ſo forfeit their eſtates for life by ſuffering the ſaid recovery? and, Will it alſo be prudent for them to ſurrender the copyhold

3. Quære.

2. Vernon, fo. 545. Cook v. Cook.

copyhold eſtates to ſome perſons for a term of years, if they, or either of them, ſhall ſo long live, previous to the ſuffering a recovery thereof?

Anſwer. I THINK, the daughters are entitled to thoſe eſtates for their lives, as tenants in common; with remainder, after the determination of the reſpective eſtates, to them and the reſpective heirs of their bodies, &c.; therefore, on the death of either, her ſhare would go to the heirs of her body, and not ſurvive; but if ſhe leaves no iſſue, I apprehend, it would go by way of croſs-remainder to the ſurviving ſiſter and her iſſue: but I cannot ſay that either of theſe points are clear; and therefore, to avoid all doubts, it would be adviſeable, by ſome conveyance of the freehold and ſurrender of the copyhold, to make proper tenants to the premiſſes, and ſuffer recoveries, to bar the remainder and limit the uſes, as they ſhall agree upon, having firſt created terms for years determinable on the daughters deaths, in truſt for themſelves. But this advice and opinion are on ſuppoſition that the eſtates are inheritances, and not for years or lives only; for as to ſuch no recoveries can be ſuffered.

4. Quære. Is the ſaid 10l. a-year a-piece, which is given by the will of the ſaid teſtator, William Marſh the ſon, to his daughters Sarah and Elizabeth for their lives only, chargeable upon the leaſhold eſtates, which are immediately before in the ſaid will given to the ſame teſtator's ſon William? or, Are not the ſame chargeable, as well upon the leaſhold eſtates as upon all other the eſtates before deviſed by the ſaid will? and if they are, In what proportion are the ſame to be paid out of the ſaid eſtates? and, Is the ſaid leaſhold eſtate which was granted to the ſame teſtator by lord Derby in 1723, in exchange for part of the lands ſubjected by the ſame teſtator's will to the payment of the ſaid annuites, liable to pay any part thereof, as in the ſaid leaſe it is not mentioned to be in exchange for any other lands, but is only ſaid to be made in conſideration of a ſum of money? and therefore, Doth not the

the ſame leaſehold eſtate deſcend to the ſame teſtator's heir at law free from any incumbrance, as the ſaid leaſe was taken ſubſequent to the making of the ſame teſtator's will, and the *habendum* thereof limited to him, his heirs and aſſigns, during the lives therein mentioned.

AS by the will the 10l. a-year is charged only on the leaſeholds given immediately before, but not on the exchanged lands, nor on any of the other eſtates given by the will in the precedent clauſes, the exchanged lands belong to the heir as undiſpoſed. Anſwer.

As the eſtate called Long Borrow, &c. which the ſaid teſtator, William Marſh the ſon, gave by his ſaid will to his ſaid daughter Sarah and Elizabeth in default of iſſue of his ſons Thomas and William, were only held by the ſaid teſtator by virtue of ſeveral leaſes granted to him, to hold to him, his executors, adminiſtrators, and aſſigns, for three lives, or for ſome term of years determinable upon the death of three lives, Are not the ſaid Sarah and Elizabeth entitled to the ſaid leaſehold eſtates? and, What intereſt have they therein reſpectively? and, Can they or the ſurvivor of them, by any and what act, bar their iſſue and the remainder limited thereof to charitable uſes? or, to whom will the eſtates belong after the death of the ſaid Sarah and Elizabeth, or either of them, if they do not act relating thereto in their life-time? 5 Quære.

THE terms for years determined on lives, belong to the daughters Sarah and Elizabeth for their lives only; and their iſſue will on their deaths be intitled to them, and cannot be barred. As to the terms for lives, I think, the daughters may by deeds of leaſe and releaſe, bar their iſſue and the remainder over to the charity; but this latter is not a clear point. Anſwer.

ARE the ſaid Sarah, Elizabeth, and Mary, the daughters of the ſaid teſtator, William Marſh the ſon, entitled to five-ſixth parts of the ſaid tracts of land in Liverpool, or to any and what part thereof reſpectively? or, Who is entitled thereto? and, Can the ſaid daughters, or any of them, by any and what act, veſt an abſolute intereſt thereof 6. Quære.

thereof in themſelves, or in any and what part thereof, there having been conſiderable improvements made thereon by the ſame teſtator ſince the making of his will?

Anſwer. THE three ſurviving ſiſters are, I conceive, entitled to theſe five-ſixths; and they may by deeds of leaſe and releaſe, convey their reſpective ſhares in truſt for themſelves, and obtain abſolute intereſts in them.

7. Quære. WILL not the leaſehold eſtates which the teſtator, William Marſh the ſon, was entitled to at his death, and which are not particularly diſpoſed of by his will, and which he held by leaſes for years, or by leaſes made to him, to hold to him, his executors, adminiſtrators, and aſſigns, for lives, and which have been purchaſed by him either before or ſince the making of his will, be conſidered as part of his perſonal eſtate? or, How otherwiſe?

14. Geo. 2. cap. 20.

Anſwer. THE leaſes for years, though determinable on lives, and ſuch leaſes for lives as in the *Quære*, are part of the perſonal eſtates, whether purchaſed before or after the will.

8. Quære. As the ſaid teſtator, William Marſh the ſon, directs, that the reſidue of his goods, chattels, ſtock in trade, and perſonal eſtate, ſhall, after payment of 500l. a-piece to his ſaid daughters Sarah and Elizabeth, be equally divided, on the 1ſt of May next after his daughter Mary ſhall attain her age of twenty-one years, amongſt his ſons and daughters, William, Thomas, Sarah, Elizabeth, and Mary, if then all living; and in caſe of any of their deaths, the ſhare of him, her or them, ſo dying, to go to his, her, or their iſſue, if there ſhall be any ſuch; and in caſe any of his ſaid ſons and daughters ſhall happen to die without iſſue, before he, ſhe, or they, ſhould attain the age of twenty-one years, then the legacy and part, portion or ſhare, of his ſaid perſonal eſtate of him, her, or them, ſo dying, to ſurvive and go the ſurvivors of his ſaid ſons and daughters equally amongſt them; and as the ſame teſtator's ſons William and Thomas both attained the age of twenty-one years, and died without iſſue, in the life-time of their father, before the ſaid teſtator's daughter Mary attained the age of twenty-one; and as the ſaid teſtator's daughter Sarah had

had a portion of 2000l. given by her father in ſuch manner as is herein-before mentioned; who will be entitled to the reſidue of the ſame teſtator's perſonal eſtate, or to any and what part thereof? or, In what manner or proportions will the ſaid teſtator's daughters Sarah, Elizabeth, and Mary, be entitled thereto, or to any and what part thereof? or, Will any and what part thereof go in a courſe of adminiſtration, and to whom? Will the ſaid 2000l. given with the ſaid Sarah be conſidered as an ademption or revocation of the ſaid legacy of 500l. and of any other and what part of the reſidue of her ſaid father's perſonal eſtate? and, Who is entitled to the ſaid 500l.? and, What ſhare of the ſaid teſtator's perſonal eſtate will his ſaid daughter Sarah be entitled to? and in what manner, and from what time, will the ſame teſtator's daughter Elizabeth Marſh be entitled to intereſt for the ſaid 500l. ſo given to her as aforeſaid, as her ſaid father had large ſums of money out at intereſt at his death? and, May not all the teſtator's daughters immediately, by their wills or otherwiſe, diſpoſe of all their right which they now have to any part of their father's perſonal or leaſehold eſtates, before any diviſion or diſtribution be made thereof?

SARAH, Elizabeth, and Mary, are, I conceive, entitled to the three-fifths of the reſiduary perſonal eſtate; the other two-fifths are lapſed, and belong to the widow and next of kin, according to the ſtatute of diſtributions, of which Henry is entitled to one-fourth of two-thirds, and the three ſiſters are entitled to the other three-fourths, and the widow was entitled to the remaining one-third of the two-fifths. The 2000l. portion was, I conceive, a revocation of the 500l. legacy to Sarah, but not of her ſhare of the reſiduary bequeſt. The daughters have an abſolute power over their reſpective ſhares now, and before any actual diviſion and diſtribution. Anſwer.

As the teſtator, William Marſh the ſon, was at his death entitled to large ſums of money out at intereſt upon bonds and mortgages, &c. and to ſeveral leaſehold eſtates, and to large quantities of timber and other things in partnerſhip with one Mr. Okell who ſurvived him, and to a ſhare of ſeveral ſhips and cargoes at ſea and elſewhere in partner- 9. Quære.

ſhip

ſhip with Mr. Okell and other perſons, and to ſeveral houſhold and other goods, and he dying the 9th of October 1747, and his ſon-in-law Samuel Jarvis dying inteſtate on the 6th of February following, before any diviſion or diſtribution had been made of any part of the perſonal eſtate or effects of the ſaid teſtator, William Marſh the ſon, and before adminiſtration with his will annexed was granted; Will the next of kin of the ſaid Samuel Jarvis be entitled to any and what part of the ſaid effects of the ſame William Marſh, which his daughter Sarah is entitled to? or, will ſhe be ſolely entitled thereto, or to any and what part thereof, as ſhe hath ſurvived her ſaid huſband, and as he made no diſpoſition of any part thereof in his life-time? and, particularly, will the next of kin of the ſaid Samuel Jarvis be entitled to any and what part of the ſaid Sarah's ſtock in trade, timber, ſhips, cargoes, or houſehold goods, of the ſame teſtator, William Marſh the ſon? and if the ſaid next of kin will be entitled thereto, Out of what part of the perſonal eſtate of the ſaid William Marſh the ſon are the debts which he owed at his death in the way of trade, or how otherwiſe, to be paid?

Anſwer. SARAH, as ſurviving her huſband, is ſolely and abſolutely entitled to her ſhare; and her huſband's next of kin are entitled to no part of it, either of the ſtock in trade, houſehold goods, or other things. The debts in trade and other debts muſt be paid out of his general perſonal eſtate not ſpecifically deviſed.

10. Quære. As the ſaid Samuel Jarvis was at his death a freeman of the city of Cheſter, and died in the ſaid city, Will not his widow be entitled to half of his perſonal eſtate by the cuſtom of the province of York, and to a moiety of the other half thereof by the ſtatute of diſtribution of inteſtate's eſtates, effects, or otherwiſe? or, What part of his perſonal eſtate will ſhe be entitled to? See ſtat. 4. & 5. Will. & Mar. c. 2.; and 1 Vernon, Stapleton and Sherrard; and Ab. Caſ. in Eq. fo. 161.

Anſwer. I CONCEIVE, his widow, there being no child, is entitled to half his cuſtomary eſtate by the cuſtom; half the remaining half under the ſtatute of diſtributions.

WILL

WILL the inſtructions or minutes which the ſaid teſtator, William Marſh the ſon, wrote down for a new will, about five years before his death, in any reſpect be conſidered as a new will, codicil, or teſtamentary ſchedule? or, In any and what reſpect alter the ſaid will made in 1722? and, Affect any and what part of his perſonal or other eſtate? and, Will any and which of the legacies thereby given take place? 11. Quære.

IF they were merely inſtructions, I think, they will not amount to a will or teſtamentary ſchedule, or alter the ſame will of 1722. Anſwer.

4th June 1748. D. RYDER.

I AM of opinion, Mary is entitled to a rent-charge in tail of 20l. a-year; and that it ought to be charged upon the eſtate of inheritance deviſed by the will, to make up the deficiency of the leaſehold, which not being capable of making good any part of the eſtate tail intended by the marriage-articles, the whole rent-charge is a deficiency, and to be ſatisfied out of the other fund. As to the diſtributive ſhare of the two-fifths, the ſtatute of diſtributions veſted one-third of them in the widow; but, I think, ſhe was barred by equity, by her marriage-articles, from claiming it; the conſequence of which is, that the whole of thoſe two-fifths belong to the four ſurviving children in equity. The executors being all dead before the teſtator, it may be a doubt whether the heirs of the ſurvivor can diſpoſe to a charitable uſe of any of the eſtates; but if not the charity will ſtand good in the ſame manner againſt the heirs or repreſentatives of the teſtator as if the executors were alive. And I am of opinion, that as to the leaſehold for years, whether determinable on lives or not, the remainder to the charity is too remote and void, but good as to the eſtates of inheritance and leaſehold for lives, though liable to be barred by the daughters, who have the precedent Additional opinion of Mr. RYDER.

eſtates

eſtates in tail, or in nature of eſtates tail; and the king or the court of chancery might appoint the particular charities to which ſuch eſtates to the charity ſhould be applied. The limitation of the remainder in five-ſixths of the Liverpool leaſe for years to the poor ſcholars there is void, but the leaſe for lives is good. The leaſes for lives purchaſed after the will did not, I think, paſs by the will; but being made to the teſtator, his executors and adminiſtrators, are diſtributable, as an undiſpoſed part of the perſonal eſtate, by 14. Geo. 2. The leaſes for years paſs by the deviſe of the *reſiduum*. The legacy of 500l. carries intereſt from the teſtator's death. The 2000l. is no bar, I think, of Sarah's diſtributive ſhare of the undiſpoſed ſurplus.

4th July 1748. D. RYDER.

Mr. FAZAKERLEY's Anſwer to the Third Quere.

I AM of opinion, that the two daughters Sarah and Elizabeth are tenants in tail, with remainder to charitable uſes, as to ſuch lands which were not deviſed to teſtator, William Marſh the ſon, by the will of William Marſh ſenior; and as to the lands deviſed by William Marſh, the teſtator's father, ſubject to the eſtates tail in the two daughters Sarah and Elizabeth, the teſtator having no further purſued the power given by his father's will (which is confined to the grandchildren), I think, there is an eſtate tail veſted in Henry Marſh, after failure of iſſue of his two ſiſters Sarah and Elizabeth; and the teſtator's deviſe to charitable uſes, as to theſe lands, is void, becauſe it is not purſuant to his power under the will of his father; but as to his other lands, the teſtator's deviſe to charitable uſes is good: but both theſe eſtates to Henry, and the charitable uſes, being only eſtates or intereſts to take place

place after an eſtate tail in the daughters, I think, the daughters Sarah and Elizabeth may by common recoveries bar the ſame, and thereby gain an abſolute property in the eſtates.

IT is clear, theſe eſtates paſs to theſe two ladies and to their iſſue; but whether they can bar the remainder-over to pious uſes is doubtful. I incline to think they may; and one of them being a married woman, the method of doing it muſt be by fine *ſur conceſſerunt*, in which the huſband of the married lady muſt join. A fine is not neceſſary for the unmarried lady as to her ſhare; it may be done by a feoffment with livery, or by a leaſe and releaſe; but as there muſt be a fine as to one of the ſiſters' ſhare, the whole may be done together by joining in the fine and declaration of uſes. Take care to make the fine to be of the intereſt they have, and no more, for fear of a forfeiture. Mr F's Anſwer to the Fifth,

I SUPPOSE you can have no doubt but that one-ſixth part belongs to the charity. As to the other five parts, there being two intereſts of a different nature, they may require two different conſiderations; the teſtator having a freehold intereſt during the lives in the leaſe, with a remainder for twenty-one years, which is a chattel intereſt. As to the firſt, *viz.* the freehold, the remainder to the charity, that is capable of being barred by the method mentioned under the *Quære* laſt above-mentioned. As to the chattel intereſt, I think, the limitation to the charity is void. the Sixth,

As to the Seventh *Quære*, the principal part thereof relates to a tenement not ſtated in the caſe, and for which the teſtator William Marſh the ſon, together with John Okell and the Seventh Quære.

Okell his partner, ſince the making the will of the 14th November 1722, contracted with the mayor, bailiffs, and burgeſſes, of Liverpool, for certain lands in Liverpool; and the mayor, bailiffs, &c. by leaſe made thereof, dated 27th November 1727, did demiſe, &c. to ſaid Marſh and Okell, their executors, adminiſtrators, and aſſigns, the ſame lands, to hold to them, their executors, adminiſtrators, and aſſigns, for three lives, and the ſurvivor of them; and from and and after the death of the ſurvivor of them, for twenty-one years. This piece of land is now of great value, a great number of houſes being lately erected thereon by meſſ. Marſh and Okell, who entered into articles to prevent ſurvivorſhip.

Anſwer. MR. MARSH's ſhare does not certainly go to the ſurvivor, but remains part of his eſtate; but in what manner it is to go, is in part very difficult. As to the chattel part of the intereſt, *viz.* the term of twenty-one years, I think it clearly goes to the legatees; and I think the freehold part limited by the leaſe for lives being to the leſſees, their executors, &c. the ſame in like manner goes to the daughters and reſiduary legatees. But this is quite a new caſe upon the late act of parliament concerning eſtates *per autre vie*; and I do not think it a clear point. But my opinion is as above.

Sir THOMAS BOOTLE's Anſwer to the Third Quære. I DO not apprehend, that the daughters can, by a recovery or otherwiſe, bar the ſubſequent remainders, or the heir at law, but upon failure of iſſue of the two daughters; and as no appointment has been made by the executors to any charitable uſes, the ſame will go to Henry as heir at law.

To the Fifth Quære. I APPREHEND, that the daughters Sarah and Elizabeth are entitled to theſe tenements, as their brothers William and Thomas died in their father's life-time.

I APPREHEND,

I APPREHEND, the daughters cannot diſpoſe of the ſeveral tracts of land contrary to the directions of the will. Sir T. Bootle's Anſwer to the Sixth Quære.

QUÆRIES 1, 2, 8, 9, and 10, not ſtated to the above Gentlemen.

BOTH the above Gentlemen, and Mr. Pinfold, a civilian in Doctors Commons, are of opinion, that the minutes or inſtructions for a new will cannot operate as a will to revoke the will of 1722, nor have any effect as a will of the perſonal eſtate.

CASE 7.

1000l. Bank ſtock, worth 1310l. being deviſed by Jacob of Barbadoes to his grand-daughters Leah and Rachel; Whether each is intitled to a moiety of the ſame, or only to 500l. each to be raiſed thereout? and on a deficiency of aſſets, Whether Jacob's executors can ſafely have a decree of the court of chancery, and in whoſe name the ſuit ſhould be? On Jacob Valverde's bringing his bill in equity to compel the executors to pay 152l. for the uſe of his children—Whether the court will not make the father give ſecurity to pay it over to his children?—Mr. MELMOTH Opinion hereon.

JACOB of Barbadoes made his will there 20th October 1724, and thereof conſtituted *A.* his executor of ſuch eſtate as he had in England, and appointed *M.* his executor and reſiduary legatee of all his eſtate in Barbadoes or elſewhere, except in England.

A CONSIDERABLE time before Jacob's death, Iſaac Fernandes Nunes, his correſpondent in England, had placed out ſeveral ſums of money he had of Jacob's in the purchaſe of 11,000l. Eaſt India bonds, by Jacob's order; and *A.* was alſo, at Jacob's death, poſſeſſed of 1164l. South Sea annuities, and 500l. South Sea annuities, belonging to Jacob, making in the whole the ſum of 12,664l. in India bonds and South Sea annuities. Jacob by his will gives as follows, (*viz.*) "I give to my ſon Iſaac, dur-"ing the term of his life, all the intereſt, money, profits, "and produce, that ſhall be yearly raiſed, from the time "of my death, on the ſum of 2300l. ſterling that I now "have in the India Company, South Sea ſtock or annui-"ties in Great Britain, or is there placed out by my couſin "Iſaac Fernandes Nunes, or my ſon Abraham in Lon-"don; and after his death, to his children. *Item*, I "give to my grandſon Jacob 3100l. ſterling money, which "I now have in the Eaſt India Company, South Sea ſtock

" or annuities, and is placed out as aforeſaid, to be paid " to my grandſon when he ſhall attain his age of twenty- " one years:" and after this manner bequeaths 12,600l. to ſeveral perſons, making uſe in each bequeſt of the aforeſaid words, " which I now have in the Eaſt India Com- " pany, South Sea ſtock or annuities, placed out as afore- " ſaid." By this will Jacob diſpoſed of as follows (to wit): " I give to my grand-daughter Leah the ſum of 500l. " ſterling money, being part of 1000l. ſterling which my " ſon *A.* hath already placed out on my account in the " bank of England, to be paid her at her age of eighteen." And in like manner gives the other 500l. to another grand-daughter, named Rachel. The 1000l. bank ſtock is worth 1310l.

Quære. WILL the two grand-daughters, Leah and Rachel, each be entitled to a moiety of ſaid 1000l. Bank ſtock, or only to the ſum of 500l. ſterling a-piece, to be raiſed by ſale thereof? or, To ſo much Bank-ſtock as was the produce of 500l. originally placed out by *A.* in purchaſe of ſaid ſtock?

Anſwer. THE teſtator having deſcribed his Bank ſtock, by calling it " 1000l. ſterling placed out in the Bank of England," and having given 500l. ſterling, part thereof to his grand-daughter Leah, and the other part to Rachel, it ſeems to me pretty plain, he intended to give the whole between them: and I apprehend, that each of them will be entitled to a moiety of the 1000l. Bank ſtock, and not to 500l. to be raiſed by ſale thereof.

JACOB's debts here in England will exhauſt near 600l. or 700l. of the effects; ſo that there will then remain in the executors hands no more than about 12,000l. capital in bonds and annuities; whereas Jacob has given away 12,600l. Many of the legatees are under age, and ſeveral truſts are declared by the will; and *A.* the executor is willing and deſirous that the truſt in the will, and the payment of the legacies, may be enforced, and he indemnified therein by a decree of the court of chancery; and Mr. Nunes, the other executor, declines proving the will, and hath delivered over ſaid 11,000l. India bonds to *A.*— *N. B.* None of the legatees live in England, except *A.* the executor, and *B. C.* and *D.* who are infants.

UPON

UPON the whole of this Caſe, Is it proper or neceſſary for *A.*'s ſafety, to have a decree of the court of chancery? if ſo, In whoſe name may the ſuit be brought? and, muſt *A.* be plaintiff or defendant? and, May it fitly be brought by Jacob the ſon of Iſaac, who is in England, by his *prochein amy*, againſt *A.* and the other legatees? 2. Quære.

SEVERAL of the legatees being infants, and their legacies being given over in caſe of their deaths before the ſame became payable, and there being a deficiency of aſſets, excluſive of the principal legacies, to pay the debts in England; I apprehend, it will be very adviſeable for Abraham Franco the executor to have a decree of the court of chancery for his direction and indemnity in executing the truſts of the will: and in order thereto, I think it will be moſt proper that a bill ſhould be brought againſt him by the teſtator's other children, and alſo all his grandchildren, as well thoſe that have legacies as thoſe to whom legacies are given over, in caſe of the death of any of the infant legatees. Anſwer.

THE teſtator hath given by his will 1520l. in legacies to the children of his ſon-in-law Jacob Valverde, who are all infants, which by the will is directed to be paid to their father; but no time is fixed by the will for this payment; and he is to pay it over to them when at age or married. This Jacob Valverde is in very doubtful circumſtances, and there is good reaſon to believe, that if this money be paid him, he will apply it towards paying his debts.

IF the father brings his bill in equity againſt the executor, to compel him to pay the 1520l. for the uſe of his children, Will not the court oblige the father to give ſecurity for his paying it over to his children, according to the directions of the will? 3. Quære.

I APPREHEND, if it ſhall appear to the court that Jacob Valverde is in low circumſtances, they will not order his children's legacies to be paid to him, but to be put out in the name of the executors, and ſome other Anſwer.

truſtee or truſtees, till the children become entitled to receive the ſame.

June 1, 1727. W. MELMOTH.

CASE 8.

Whether the executors of the will of *T. A.* are entitled to the whole ſurplus of his perſonal eſtate, to purchaſe lands or otherwiſe for *T. E.* and other uſes therein limited? Who is entitled to ſurplus if not legally deviſed to the executors? How they are to act as to teſtator's perſonal eſtate. Whether they are bound to veſt all the perſonal eſtate in *T. E.* or can be acquitted by paying it to *T. E.*? If the reſiduary part is to be divided according to the ſtatute of diſtribution, Whether *S. T* a half-ſiſter, will be entitled to a ſhare?—The ſeveral Opinions of Mr. SERJEANT WHITAKER, Mr. SERJEANT CHAPPELL, and Sir PHILIP YORKE, thereupon.

TIMOTHY HARE, of the iſland of St. Chriſtopher's, Eſq. being ſeiſed in fee of ſeveral lands and tenements in the ſaid iſland and in Nevis, and in other places, and alſo poſſeſſed of a large perſonal eſtate, did, ſome time before his death, make his laſt will and teſtament in writing, as follows, *viz.*

"IN the name of God, Amen. I Timothy Hare, of "the iſland of Saint Chriſtopher's being of ſound mind "and underſtanding, thanks be given to Almighty God, "do make and ordain this my laſt will and teſtament in "writing in manner following: (that is to ſay) I do, in "the firſt place recommend my ſoul to God, who gave "it, and my body to the earth to be decently interred; "and hereby revoking and annulling all former and other "will and wills, by me made, do diſpoſe of my worldly "affairs in manner following. *Imprimis*, I give and be-"queath unto the honourable William Matthews, Eſq. "lieutenant-general of all his majeſty's Leeward Iſlands "in America, the ſum of 100l. ſterling; unto the ho-"nourable John Willett, of the iſland aforeſaid, eſq. 100l. "ſterling; unto John Pogſon, of the ſaid iſland, eſq. 50l. "ſterling. *Item*, I give and bequeath unto my beloved "friend mrs. Margaret Taylor, who now lives with me, "the ſum of 10,000 lb. of Muſcovado ſugar, to be paid "her, ſoon after my deceaſe, at the town of Baſſe-Terre. "*Item*, I give and bequeath more unto the ſaid Margaret "Taylor the profits, uſe, ſervice, and occupation, of "the negroes following, (*viz.*) a houſe-negro woman "named Betty Vaughan, and her three children, Sarah,

"Pockey,

" Pockey and Timothy Taylor, a mulatto girl named " Nancy, and a negro girl named Abigail, to poſſeſs the " ſaid negroes and mulatto during her life; and after her " deceaſe, the ſaid negroes and their iſſue, or ſo many " of them as ſhall be then living, ſhall be returned to my " executors or reſiduary legatee hereinafter mentioned. " I do alſo give and deviſe more unto the ſaid Margaret " Taylor, all the houſes which are now building by Jaſper " Thomas, free negro, on a certain piece of land in Baſ- " ſe-Terre-Town, bounded to the eaſtward with the com- " mon ſtreet, to the ſouthward with lands now in the " poſſeſſion of Lieutenant Charles Lownds, to the north- " ward with land of Mrs. Elizabeth Clare, to the weſt- " ward with the back ſtreet which joins with the houſe I " live in, to poſſeſs and enjoy the aforeſaid houſes when " finiſhed, with all the rents and profits of the ſame, dur- " ing her life; and after her deceaſe, the houſes which " ſhall be ſtanding on the aforeſaid ground to be peaceably " and quietly delivered up, with all the land bounded as " before-mentioned, unto my executor or reſiduary lega- " tee; which houſes and land, if delivered up as before is " mentioned, ſhall be in full of all demands from the exe- " cutors to the eſtate of the ſaid Margaret Taylor. I do " further give to the ſaid Margaret Taylor ſix ſilver ſpoons, " and forks, tea-ſpoons and tongs; one half of all my " pewter that is uſed about my houſe, with one half of my " table and bed linen; one dozen of chairs, four pillows " and a counterpane, and a ſet of curtains for a bed; two " iron pots, one iron ſpit, and a waſhing kettle; a ſorrel- " horſe which ſhe uſed to ride, and one new ſide-ſaddle; " a walnut-tree table and looking-glaſs. *Item*, I give, de- " viſe, and bequeath, unto my nephew Henry Earle three " negroes, *viz.* a young negro-man named Jo or Job, a " houſe-negro woman Black Betty, a negro boy named " Billy who now looks after the cows, my riding-horſe, " with ſaddle holſters piſtols and ſilver-hilted ſword, all " the remaining part of my houſhold goods and houſhold " plate, and anannuity or yearly ſum of 200l. current " money of this iſland, to be paid yearly during his life, by " my nephew Timothy Earle, or his heirs, or whatſoever " perſon who ſhall, by virtue of this my will, be ſeiſed " of my real eſtate hereinafter deviſed, upon conditi- " on that the ſaid Henry Earle ſhall upon the rea- " ſonable requeſt of my executors, within ſix months " after my deceaſe, upon conſideration of the afore-

" ſaid

" ſaid annuity, &c. aſſign, transfer, or convey, by leaſe
" and releaſe, or other reaſonable act ordered in the law,
" all the right, title and intereſt, which he the ſaid Henry
" Earle hath to grant of lands in Baſſe-Terre Quarter,
" commonly called La Garrique's Plantation: and alſo
" to a grant he holds jointly with myſelf of a plantation
" near Cayenne Hill, commonly called Ogee's Plantati-
" on: Provided alſo, and my will is, that the ſaid Henry
" Earle ſhall, for two years after my deceaſe, aſſiſt my exe-
" cutors to write out, ſettle, and prove, all my accounts
" depending in Nevis or this iſland; which if he refuſes
" to do as far as ſhall be reaſonably in his power, then
" the legacy or annuity hereby given ſhall be void. *Item*,
" I give and bequeath unto Charles and Elizabeth Barrow,
" the ſon and daughter of mr. Charles and my daughter-
" in-law mrs. Elizabeth Barrow deceaſed, the ſum of 50l.
" ſterling, to be paid at the diſcretion of my executors. I
" give and bequeath unto my ſiſters Ruth, Joan, and
" Mary, all living in or near Plymouth, in the county of
" Devon, to each of them 10l. ſterling; to my ſiſter Joan's
" daughter the ſum of 50l. ſterling *Item*, I give, be-
" queath, and deviſe, all my lands, tenements, and here-
" ditaments in Nevis, or any other part of the world, to
" my nephew Timothy Earle of Totneſs, in the county
" of Devon, and to the heirs of his body lawfully to be
" begotten; and for want or default of ſuch iſſue, then I
" give and deviſe the ſame unto Timothy Nicholls, ſon of
" Clement Nicholls, by his wife Suſan, now living in Ply-
" mouth, and to the heirs of his body lawfully to be be-
" gotten; and for want of ſuch iſſue, then I give and
" deviſe the ſame unto Clement Nicholls, the brother of
" the ſaid Timothy, and to the heirs of his body lawfully
" to be begotten; and for want of ſuch iſſue, then I give
" and deviſe the ſame unto Henry Nicholls, the brother
" of the ſaid Timothy and Clement, and to the heirs of
" his body; and for default of ſuch iſſue, then I give and
" and deviſe the ſame unto the pariſh of Brent, to build
" a free-ſchool, and for the maintenance of a free-ſchool,
" to teach as many ſcholars to read and write as far as
" my eſtate will reach. Laſtly, I make and ordain my
" dear friends the honourable John Willett, of the afore-
" ſaid iſland, eſq. and captain John Pogſon, of the ſaid iſ-
" land, eſq. executors of this my laſt will. And I deviſe
" unto them the care and guardianſhip of my nephew Ti-
" mothy Earle; and likewiſe the care and management

" of

"of all the eſtate given unto him by this my will, until "he attain his age of twenty-one years, with power to "make leaſes of all or any part of my real eſtate during "the term aforeſaid. And I further recommend it to and "impower my aforeſaid executors to purchaſe all ſuch "lands in the town of Baſſe-Terre, or elſewhere, in the "diviſion whereof I am now poſſeſſed, whenſoever his "Sacred Majeſty ſhall declare his pleaſure for the diſpoſal "of the French lands, or any other eſtate which they ſhall "think convenient. I give and deviſe to them, or the "ſurvivor of them, all ſuch ſum and ſums of money, to "be raiſed out of my whole eſtate, as ſhall be neceſſary "or ſufficient to pay the aforeſaid purchaſes: Provided al- "ways, and my will and deſire is, that the ſaid eſtate or "eſtates when purchaſed ſhall be ſettled and conveyed, by "good advice in the law, to my aforeſaid nephew, with "the aforeſaid limitations and remainders as my real eſ- "tate by this my will is deviſed. In witneſs whereof, &c. "6th day of April, *Aanno Domini* 1723.

"TIMOTHY HARE."

THE will is all of the teſtator's own hand-writing, and was ſigned and duly executed by him in the preſence of three witneſſes; and he died without revoking or alter- ing it.

WE are apprehenſive, that the intent and meaning of the ſaid teſtator was to give the ſurplus of his perſonal eſ- tate to the ſaid Timothy Earle his nephew; and the ra- ther, for that after the teſtator's death there was found in his eſcritoir a rough draft of a will of his own hand- writing to the ſame purport as the preſent will, but not ſigned or ſealed, in which the teſtator gave all the ſurplus of his perſonal eſtate to his nephew Timothy Earle: but the teſtator not having declared his intention in the pre- ſent will in expreſs words who ſhould have the ſurplus of his perſonal eſtate, but only that he gave and deviſed to his executors all ſuch ſums of money, to be raiſed out of his whole eſtate, as ſhould be neceſſary, and ſufficient for the purpoſes mentioned in the ſaid will:

WHETHER, as the will is worded, the whole ſurplus of the teſtator's perſonal eſtate is well deviſed to the exe- cutors? and, If they are thereby fully entitled to receive the ſame, and diſpoſe of and lay it out in the purchaſe of lands, or otherwiſe, as directed by the will for the benefit of 1. Quære.

of the ſaid Timothy Earle, and ſuch other uſes as limited therein?

SERJEANT WHITAKER, 23d March, 1728.

ON peruſal of a copy of this will, as well as this Caſe, I am of opinion, that the ſurplus of the perſonal eſtate, after the ſaid ſpecific and pecuniary legacies are paid, is well given to the executors, to be by them laid out for the purchaſe of lands deſcribed in the will of which the teſtator was poſſeſſed, or any other eſtate they ſhall think convenient; and the rather, becauſe of the directions in the will to raiſe all ſuch ſums of money out of his whole eſtate as ſhall be neceſſary and ſufficient to pay for the aforeſaid purchaſes; and this the reſiduary part or ſurplus of the teſtator is diſpoſed of, and muſt be applied for ſuch purchaſes; and thereby a ſettlement being made, Timothy Earle will be the reſiduary legatee.

SIR PHILIP YORKE, Attorney-General, 22d April, 1725.

THE will is unſkilfully and defectively penned. But I am of opinion, that conſidering the whole together, it is ſufficient to paſs the ſurplus of the teſtator's perſonal eſtate. The bare nominating mr. Willett and captain Pogſon to be executors, in point of law veſts the whole perſonal eſtate in them; and the latter clauſe, giving the executors an unlimited power to purchaſe ſuch lands as they ſhould ſee convenient, and afterwards bequeathing to them all ſuch ſums of money, to be raiſed out of his whole eſtate, as ſhould be ſufficient to pay for the aforeſaid purchaſe, is, I think, a plain declaration of his intent, that his executors ſhould have the ſurplus of his perſonal eſtate, in truſt to be laid out in lands to be ſettled to the uſes mentioned in the will.

2. Quære.

IF the ſurplus of the teſtator's perſonal eſtate is not legally deviſed to the executors by the ſaid will, for the purpoſes therein mentioned, Who then is entitled to the ſurplus thereof, the teſtator having three ſiſters, to whom he has given 10l. a-piece by his will; by which it is reaſonable to believe he did not intend to give them any more?

I AM

I AM of opinion, that the ſurplus or reſiduary part of the teſtator's perſonal eſtate is given to the executors, for the purpoſes therein mentioned; and if it had not, the brothers and ſiſters of the ſaid teſtater have, and if any of them are dead the children of ſuch brother or ſiſter deceaſed will be entitled likewiſe, though the teſtator had given them legacies. But I am of opinion, here can be no diſtribution; the ſurplus or reſiduary part is to be applied in purchaſe of lands, according to the teſtator's will. SERJEANT WHITAKER.

IF the ſurplus of the perſonal eſtate be well deviſed, as I conceive it is, this queſtion is out of the caſe; but if it was not well deviſed, then I conceive, it would belong to the teſtator's three ſiſters, and the children of any brother or ſiſter who are dead, the executors having particular legacies given them by the will. Mr. ATTORNEY-GENERAL.

IN what manner muſt the executors act as to the perſonal eſtate of the ſaid teſtator? May the executors take upon them the execution of the ſaid will, as to any and what part of the perſonal eſtate? or, Muſt adminiſtration of the whole perſonal eſtate be committed to the teſtator's three ſiſters, and the ſame diſtributed amongſt them, or who elſe? or, Who may make ſuch diſtribution? 3. Quære.

THE executors are to pay and deliver the ſpecific and pecuniary legacies; and after all paid and delivered, to apply the ſurplus and reſiduary part of the teſtator's perſonal eſtate in purchaſing lands according to the teſtator's will. And ſuppoſing a diſtribution was to have been made of this *reſiduum* or ſurplus, which, I am of opinion, is not to be done, yet no letters of adminiſtration are to be taken out, but the executors would be obliged to make ſuch diſtribution; which now, on the whole contents of the will, I am of opinion, is not to be done, but to be applied in purchaſing lands. SERJEANT WHITAKER.

IF

Mr. Attorney-General.

IF the executors intend to take on them the executorſhip, and act in the truſt, they muſt prove the will, and poſſeſs themſelves of the whole perſonal eſtate, as they are entitled to do by law, ſubject to the debts, legacies, and truſts, mentioned in the will. No adminiſtration, unleſs the executors renounce the executorſhip.

EDWARD WHITAKER,
PHILIP YORKE.

ADDITIONAL CASE, *being a* LETTER *from one of Mr.* HARE's Executors.

"SIR,

"I AM glad to hear that Timothy Earle is like to have "the whole eſtate. It will ſave the executors much "trouble. I am ſenſible mr. Hare deſigned him all; yet "I ſomewhat doubt whether ſerjeant Whitaker was "appriſed of the circumſtances of mr. Hare's eſtate. "He was poſſeſſed of two hundred acres of French land, "of which, at the time of making his will, he was only "tenant at will; but theſe lands were ſtocked with two "hundred negroes, cattle, horſes, and all neceſſary utenſil "for ſugar-making, which were always deemed perſonal "eſtate. And I am perſuaded, that the clauſe in mr. Hare's "will had regard or meant only to provide for the purchaſe "of thoſe two hundred acres he was poſſeſſed of. If "diſappointed of thoſe two hundred acres, as we did not "then know upon what footing thoſe lands might be "ſold, then we were to purchaſe ſuch another eſtate to "employ the negroes and ſtock on; but he could not mean "to veſt his whole perſonal eſtate into a real one; becauſe "his negroes, cattle, and all moveables, were deemed part "of his perſonal eſtate, and he could not poſſibly mean to "ſell them to purchaſe lands with; for naked lands here, "without negroes, &c. bring in little advantage: beſides, "his other chattles, debts, &c. will amount to 10,000l. "or more, this country money; and it is not poſſible or "practicable here to lay out that ſum, or the tenth part "of it, in lands. I could gladly know ſerjeant Whitaker's "further opinion, If we that are the executors are abſo-

"lutely

" lutely bound to veſt all the perſonal eſtate into land,
" or if we can be acquitted by paying it to mr. Timothy
" Earle? for it would be the work of our whole lives, and
" perhaps of another generation, to get land for ſuch a
" ſum."

THE above-mentioned circumſtances (though they are very material as to the conduct of the executors) yet do not vary me from my former Opinion as to the veſting the eſtate, both real and perſonal, in mr. Timothy Earle. The teſtator by his will plainly intends an eſtate tail, with remainders over; and the eſtate tail in the lands to be purchaſed is to be limited to mr. Timothy Earle; and the remainders over are in his power, to bar and dock his eſtate tail and remainders over; and that being ſo, it is but a vain thing to purchaſe lands and convey them to Timothy Earle, with remainders as in the will, when the next moment Timothy Earle can by a recovery bar the eſtate tail and remainders over, and ſell or give the eſtate in land away how and to whom he pleaſes: therefore when mr. Earle comes of age, and can diſcharge the executors, they may ſafely deliver up the truſt eſtate, both real and perſonal, to him. And as to the ſtock or negroes, and the like, which are on the plantation, they need not be diſpoſed of, but continue on the plantation at the will and pleaſure of Timothy Earl; and the executors need not concern themſelves; nor indeed, according as the will is to be conſtrued, ſhould they take any of the ſtock off the plantation to diſpoſe thereof, and therewith to purchaſe lands. Therefore, on the whole matter, I adviſe the executors, firſt, to ſee the pecuniary legacies paid to ſuch legatees as were alive at the time of the teſtator's death; for ſuch legatees as died before, their's are lapſed legacies, and belong to the executors in truſt for Timothy Earle. The next care will be, that the executors not only procure for Henry Earle the proviſion that is made for him, and the legacies to be ſecured and paid, but that

SERJEANT WHITAKER.

Henry

Henry Earle do in all reſpects perform the conditions ſpecified and annexed to the legacies and gifts made by the teſtator's will. And theſe things done, and all the debts and legacies paid as above-mentioned, a full and fair account being made, the executors may ſafely deliver up to Timothy Earle, and aſſign to him all the remaining part of the teſtator's eſtate, and to be diſcharged of their truſt; and need not veſt any of the teſtator's perſonal eſtate in purchaſing lands.

4th September 1728. EDWARD WHITAKER.

Mr. Attorney-General.

THE circumſtances in the Additional Case in my apprehenſion make a difference in the determination of the principal queſtion, and may have a conſiderable influence in the conſtruction of this will; for they ſeem to point out the intention of the teſtator to be, that his executors ſhould purchaſe lands in the diviſion of Baſſe-Terre, whereof he was poſſeſſed when they ſhould be offered to ſale; or if thoſe lands could not be purchaſed, then any other eſtate of near equal value to the former; for I think, the ſubſequent words, "any other eſtate which they ſhall "think convenient," may in point of value be properly reſtrained by the precedent words, which deſcribe the eſtate originally in the view of the teſtator to be purchaſed. The conſequence of this will be, that the whole ſurplus of the perſonal eſtate is not to be laid out in land, but only ſo much thereof as will purchaſe ſuch an eſtate as is before deſcribed; and in that caſe, as the executors have particular legacies given to them, the reſidue of the perſonal eſtate ought to be conſidered as undiſpoſed, and to be equally divided amongſt the teſtator's ſiſters, and the children of any brother or ſiſter who is dead, according to the ſtatute for ſettling inteſtates eſtates, unleſs there be ſome Act of Aſſembly in the iſland directing the particular manner of diſtributing inteſtates eſtates. This being a queſtion of

ſome

ſome value as well as difficulty, I think it adviſeable for the executors to take the direction of a court of chancery thereupon, before they diſpoſe of the eſtate; which may be properly had, upon a bill brought againſt them for an account of the eſtate and performances of the truſts of the will, making Timothy Earle the nephew and the next of kin parties thereto. As to ſo much of the perſonal eſtate as is directed to be laid out in land, whether it ſhall be conſtrued to compriſe the whole, or only part of the ſurplus, I am of opinion, that the ſame muſt be laid out in land, and ſettled to the uſes mentioned in the will, and that the executors will not be juſtified in paying it into the hands of Timothy Earle the nephew: for it has been determined in the court of chancery, that all perſons in remainder ought to have their chance for the eſtate, ſince the firſt tenant in tail may poſſibly die without iſſue or before he may have it in his own power to bar the entail; which reaſon holds ſtrongly in the Leeward Iſlands, there being no method of ſuffering common recoveries there.

29th November 1728. P. YORKE.

N. B. THE ſaid Timothy Earle hath now attained his age of twenty-one years.

Mr. SERJEANT CHAPPELL on both Caſes.

To the FIRST QUESTION. If the draft of the will found in the teſtator's eſcritoir has any date, and appears to be later in time than the will before ſtated; then, I apprehend if the will under conſideration ſhall be deemed not to carry the *reſiduum* of the perſonal eſtate, the ſaid draft being all of the teſtator's own hand-writing, and not being contradictory to the will, but conſiſtent with it, may have the effect of a codicil, ſo as to give the *reſiduum* to his nephew mr. Timothy Earle; but if it has no date, or is dated before the preſent will, then the ſame muſt be taken to be revoked,

revoked, and cannot be of any conſequence in this caſe, as I conceive.

I HAVE peruſed and conſidered the will, and the many circumſtances relating thereto; and am of opinion, that the *reſiduum* of the teſtator's perſonal eſtate is thereby well veſted in the executors, to be by them laid out in the purchaſe of lands of inheritance in the Leeward Iſlands, or elſewhere within his majeſty's dominions, if convenient purchaſes are not there to be found; which eſtates, when purchaſed, muſt and are to be ſettled upon the ſaid Timothy Earle, with like remainders as in the will. But as this matter is liable to ſome doubt, I think it adviſeable that the directions of a court of equity ſhould be firſt had, for the ſecurity of the executors.

Anſwer to the Second Quære. IF the ſurplus ſhall be adjudged not to be diſpoſed of by the will, the ſame muſt be applied according to the ſtatute of diſtributions, (*viz.*) amongſt the next of kin of the teſtator in equal degree, who I underſtand are his three ſiſters and his half-ſiſter.

May 29, 1729. WM. CHAPPELL.

ADDITIONAL CASE.

Additional caſe THAT there is now living Suſan Trickett, a half-ſiſter by the father's ſide to mr. Timothy Hare deceaſed, who, at the teſtator's death, had two ſons and one daughter living, (*viz.*) Clement Nicholls, Henry Nicholls, and Sarah Nicholls. That the ſaid Clement and Henry Nicholls are both named in the ſaid teſtator's will, and the eſtate ſettled upon them after the deceaſe of mr. Timothy Earle, and Henry Earle his brother, *upon their dying without iſſue*: but the ſaid Suſan Trickett, or her daughter Sarah, have nothing left them, nor are mentioned in the will.

IF

Quære.

If any part of the teſtator's perſonal eſtate is to be divided according to the ſtatute of diſtributions of inteſtates eſtates, it is apprehended, that the ſaid Suſan Trickett, the half-ſiſter by the father's ſide, will be entitled to a ſhare thereof; and if ſhe ſhould happen to die, her daughter Sarah will be entitled to it in her mother's right, if not in her brother's likewiſe.

The ſaid mr. Hare had no brother, and but four ſiſters, *viz.* three own ſiſters, to whom he hath given 10l. a-piece, and one half-ſiſter, the ſaid Suſan Trickett, and they are all four living.

Serjeant Whitaker's Opinion.

THE will of mr. Timothy Hare, late of St. Chriſtopher's, and who died there, being laid before me again, to conſider whether the reſidue of the teſtator's perſonal eſtate undiſpoſed of, or ſuppoſed not to be expreſsly diſpoſed of by his will, is equally to be divided amongſt the teſtator's ſiſters, and the children of ſuch brothers or ſiſter as are dead, according to the ſtatute for ſettling inteſtates eſtates; and it being repreſented to me, that the teſtator had no other ſiſters but thoſe named in the will, and Suſannah Trickett, mother of Clement and Henry Nicholls, deviſees in remainder, in the teſtator's will, of the lands therein mentioned; and that the teſtator had no brother: —On conſideration of this will, in its ſeveral points, I am of opinion, that the reſiduary part is not to be divided according to the ſtatute, but to be applied in purchaſe of lands, according to my former opinion.

It is remarkable, that by this will of the teſtator, in his ſpecific legacies of the profits and ſervice of the negroes in the will deſcribed, the teſtator directs, that thoſe negroes and their iſſue ſhall be returned to his executors, or reſiduary legatee thereinafter mentioned; ſo that by that part of the will the teſtator points out and intends a reſiduary legatee: and then it muſt be conſidered, whether there be any ſuch by conſtruction, or *implied or expreſſed.*

Then after a deviſe of ſome lands to Margaret Taylor, who is the legatee of the negroes aforeſaid (for her life), he

he directs, that after her deceaſe theſe deviſed premiſſes ſhall be quietly delivered up to his executors, or reſiduary legatee. So here is plainly the intent of the teſtator to diſpoſe of the reſidue of his eſtate by his will, and to have a reſiduary legatee.

In another part of this will, the teſtator gives an annuity to Henry Earle. The teſtator directs it to be paid him yearly, during his life, by his the teſtator's nephew, Timothy Earle, or his heirs, or by whatever perſon who ſhall be ſeiſed by virtue of the will of the teſtator's eſtate thereby deviſed. This part of the will, I think, does prove the teſtator at leaſt intended Timothy Earle to be his reſiduary legatee; eſpecially conſidering what is further contained in this will, "in order to buy land for the "benefit of Timothy Earle, who is brother to this Henry "Earle."

Then by this will the teſtator gives pecuniary legacies to three of his ſiſters, Ruth, Joan, and Mary; ſo that the teſtator by his will intends them no more. And though he does not give his ſiſter Suſannah any legacy, yet he limits a remainder in tail to two of her ſons, Clement and Henry Nicholls, in default of iſſue of Timothy Earle, the firſt deviſee in tail: ſo that the teſtator could not forget his ſiſter Suſannah, mother of theſe two.

After theſe pecuniary legacies to his ſiſters and others, which he expreſsly mentions in his will, then there is a deviſe to Timothy Earle in theſe words, (*viz.*) "*Item*, "I give and bequeath and deviſe all my lands, tenements, "and hereditaments, in Nevis, or any other part of the "world, to my nephew Timothy Earle, ſon," &c. "and "to the heirs of his body lawfully to be begotten; with "remainders over in tail to others." So that on theſe parts of the will already taken notice of, Timothy Earle may be plainly taken and *intended* to be the reſiduary legatee of the perſonal eſtate, or *ceſtuy que* truſt thereof, when

when theſe parts of the will come to be conſidered with what ſo llows therein.

THE ſubſequent words and deviſes and diſpoſitions of the teſtator's eſtate, when conſidered, will not make againſt but for this conſtruction, and, joining all the parts of the will together, enforces this conſtruction. When the teſtator hath, by his will, given all his lands, tenements, and hereditaments, in Nevis, or in any other part of the world, to his nephew Timothy Earle, in tail; and by the ſame will afterwards directs his executors, in the manner mentioned in the will, to purchaſe lands to the like uſes; and goes further, "gives the care and guar-"dianſhip of his nephew Timothy Earle, and the care "and management of all his eſtate given unto him by "his will;" it is not ſaid, "therein-before given by his "will," or any other words to confine or reſtrain, or deſcribe any particular eſtate or eſtates before given by the will, or any former deviſe or legacy, but thus—"the "care and management of all the eſtate given unto him "by this my will, until he attain," &c. and this is with power to make leaſes, &c. Now this is not to be confined or reſtrained to the former deviſes of the lands the teſtator was ſeiſed of, but relates to and is a direction as to ſuch lands as ſhould be purchaſed according to the direction of the teſtator's will: and then in the teſtator's will are theſe words, (*viz.*) "And further I recommend "it and impower my executors to purchaſe all ſuch lands "in the town of Baſſeterre, or elſewhere in that diviſion, "whereof I am now poſſeſſed, whenever his majeſty, &c. "ſhall declare his pleaſure for the diſpoſal of the French "lands, or any other eſtate which they ſhall think con-"venient." I am of opinion, that when the teſtator has given the executors ſuch a diſcretionary and large power, and in the former part of his will has deviſed to Timothy Earle all his lands in Nevis, or any other part of the

world, it will be a hard and a ſtrange conſtruction to confine and reſtrain this diſcretionary power of the executors only to theſe French lands or St. Chriſtopher's, when the teſtator's will has not done it, but left it at large: and it will be as hard by the circumſtances mentioned in the additional caſe ſent by the executors to England, and to be proved as matter *dehors* and out of the will, to ſay, that the reſiduary part of the teſtator's eſtate is not to be veſted in lands, and that in any part of the world, parcel of the dominions of his majeſty's crown. But then the teſtator by his will directs, that the ſaid teſtator's eſtate or eſtates, "when purchaſed, ſhall be ſettled on my aforeſaid "nephew, with the aforeſaid limitations and remainders "as my real eſtate by this my will is deviſed." So that if the will is to govern and ſhew the intent of the teſtator, here is another proof that Timothy Earle is the reſiduary legatee intended by this will. And I think, theſe additional matters ſuggeſted by the laſt Caſe ſent to England, are not to be admitted as ingredients to explain this will.

On the peruſal of the whole will, and conſidering the parts above-mentioned, I am of opinion, the reſiduary part of the teſtator's perſonal eſtate is not to be diſtributed according to the ſtatute Car. 2. for ſettling inteſtates eſtates, but to be applied as already mentioned. As to the lands of which the teſtator died ſeiſed, and deviſed to Timothy Earle in tail, with remainders over, I am of opinion, he may bar and dock this eſtate tail, and theſe remainders; and by a deed leading the uſes of a recovery for that purpoſe limit an eſtate in fee to himſelf; and ſuch recoveries are often ſuffered in the Common Pleas by laying of lands in ſome pariſh or vill in Middleſex, ſuppoſing there is no other method by the laws of the plantation directed, as I believe there is not either in St. Chriſtopher's or Nevis.

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As to the lands to be purchaſed, I think it a vain thing for the executors to purchaſe lands and to convey them to Timothy Earle in tail, with remainders over, when he, or any other remainder-man, when tenant in poſſeſſion, may bar and dock ſuch eſtate-tail and remainders. Indeed, on marriage-ſettlements, or family ſettlements, or articles for ſuch, and to apply truſt-money for ſuch purpoſes, a court of equity may have decreed, on circumſtances, ſuch truſts to be ſpecifically executed, and lands to be purchaſed and ſettled for ſuch eſtate-tail, with remainders over: but as this Caſe is, when the firſt tenant in tail is of full age, he can the next moment the conveyance is made to him bar and dock the remainders, as well as his eſtate tail; ſo that it is aſking for a decree which in ſuch caſe would be immediately rendered uſeleſs. But however, and be that as it will, I am of opinion, that the reſiduary part of the teſtator's perſonal eſtate belongs to the executors and Timothy Earle as *ceſtui que* truſt, and that no diſtribution ought to be made thereof to any of the other kindred of the teſtator by virtue or colour of the ſtatute for ſettling inteſtates eſtates, or any other pretence whatſoever.

January 17, 1728-9. EDW. WHITAKER.

I HAVE conſidered mr. ſerjeant Whitaker's Opinion, with his arguments ſupporting it, dated 17th January, 1728-9, but cannot find ſufficient reaſon therein to depart from my former Opinion above written; and I ſtill think it moſt adviſeable for the executors to take the directions of a court of equity in the manner pointed at above. Mr. Attorney General's Opinion.

April 4, 1732. P. YORKE.

CASE 9.

A. B being tenant in taken of copyhold lands, with remainder to *C. D.* in fee

—the OPINION of Mr. Cox, Whether the remainder may be diſpoſed of by will?

G. B. a minor of about fourteen years of age, ſon of *H. B.* is admitted to certain copyhold lands, to him the ſaid *G. B.* in tail, remainder to the ſaid *H. B.* in fee.

Quære. CAN *H. B.* now ſurrender his contingent remainder to the uſe of his will? and, Will ſuch ſurrender, without admittance, operate to bar the heir at law?

Anſwer. HAD *G. B.* the ſon been only tenant for life, remainder to the ſaid *H. B.* in fee, then the admiſſion of the ſon for his life would in conſtruction of law, have been the admiſſion of the father alſo to the remainder in fee; but not to prejudice the lord of his fine due in ſuch caſe by the cuſtom of the manor: and in ſuch caſe the father might, without any other admiſſion, ſurrender his remainder to the uſe of his will, and then diſpoſe of the ſame by his will; for the eſtate for life and remainder in fee make but one eſtate for this purpoſe, in judgment of law. This point is ſettled.

BUT the preſent Caſe goes on further: the ſon is not barely tenant for life, but tenant in tail to him and the heirs of his body, which is an eſtate of inheritance (though in tail), and may continue for ever: and though upon ſearch I do not find this point at any time adjudged by the court, yet I incline in my Opinion, that the admiſſion of the ſon ſhall alſo amount to the admiſſion of the father in remainder; ſo that *he may now* ſurrender the remainder, *for default of iſſue of his ſon*, to the uſe of his will, and then make a will thereof; for the father's remainder, though expectant upon the ſon's eſtate tail, is as much a remainder as if the ſon had only an eſtate for his life; and that it makes but one eſtate for this purpoſe, as fully as where a man makes a gift in tail, remainder in fee without deed, the

the remainder is good, and paſſeth by the livery and ſeiſin made only to the tenant in tail. But the Caſe not having been *judicially determined* (that I know of), if the lord will accept a very ſmall ſum to *admit the father actually to the remainder*, it is adviſeable to give it, and the father to ſurrender to the uſe of his will, or to the uſe of whom he pleaſes: but if the ſon lives to twenty-one, he may bar *all by his common recovery.*

1729. JA. COX

THIS Opinion may now be relied upon.

See Titles "COPYHOLDS" *and* "SURRENDER of COPYHOLDS."

CASE 10.

W. Was admitted in fee, under the will of *G. B.* his father-in-law, to one copyhold meſſuage, with the appurtenances, in *K.* holden of the ſaid manor, and ſurrendered the ſame to the uſe of his will. 13. Dec. 1665.

A woman having by her will deviſed certain copyhold eſtates, firſt duly ſurrendered for that purpoſe, and having afterwards married —The OPINION of Mr. FAZAKERLEY, Whether under the circumſtances of the following Caſe the marriage was a revocation of the will?

THE ſaid *W.* by his will duly made, gave and bequeathed the ſaid premiſes to be ſold by his executor, within twelve months after his death, for payment of the legacies hereinafter mentioned; and did thereby declare it to be his will and meaning, that if his executor ſhould, within ſix months next after his death, pay to *R. W.* his youngeſt ſon, and *M.* his daughter, 100l. each, and 100l. to his three grandchildren, *R. W.* and *J.* that then his executor ſhould have and enjoy the ſaid premiſes to him and his heirs for ever; and appointed *W. W.* his executor, who proved the ſame. 6. Sept. 1705.

THE ſaid *M. W.* was admitted in fee to the ſaid premiſes under the will of the teſtator, and *bargain and ſale thereof from W. the executor* to the ſaid *M.* in conſideration 4. Sept. 1707.

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tion of 300l. paid by her to the executor, and ſurrendered the ſame to the uſe of her will.

NOTE, It is believed 100l. part of the conſideration-money, was paid in diſcharge of the aforeſaid legacy given by the will of *W.* to *R.* his ſon; 100l. the ſaid *M.* was entitled to as a legacy under the ſame will, and for ſecuring the remaining legacy of 100l. to *R. W.* and *J.*

4. Sept. 1707. THE ſaid *M.* did ſurrender the aforeſaid premiſes to *W.* the executor in fee, on condition to be void on payment by the ſaid *M.* her heirs, executors, adminiſtrators, or aſſigns, of the ſaid ſum of 100l. to the ſaid *R. W.* and *J.* at their reſpective ages of twenty-one years, in diſcharge of the ſame ſum given to them by the will of *W.* their grandfather.

THE condition of the ſurrender was performed.

1709. A TREATY of marriage was on foot between *R. D.* and the ſaid *M. W.*; and in conſideration of upwards of 200l. which the ſaid *D.* received as her fortune, did on or about

FEBRUARY 1709, by indentures of leaſe and releaſe (previous to their intermarriage) grant, releaſe, and convey to truſtees, and their heirs, certain lands, &c. to the uſe of himſelf for life; remainder to the ſaid *M. W.* his intended wife, for life, for her jointure; remainder to the heirs of their two bodies to be begotten; remainder to the right heirs of the ſaid *R.* and *M.* in fee.

Feb. 1, 1709. *M. W.* by a certain writing, ſealed and publiſhed in the preſence of three witneſſes, mentioned to be her laſt will and teſtament, *reciting the ſaid marriage, and in conſideration of the ſaid ſettlement, and for the love and affection which ſhe had for D. did give and deviſe the ſaid premiſes, which were copyhold, to D. for life, not committing waſte; remainder to the iſſue of their two bodies to be begotten, and the heirs of ſuch iſſue*; remainder to her nephews *R. W.* and *J.* to be equally divided between them, or ſo many of them as ſhould be living at the time when the ſaid deviſe ſhould take effect, and to their heirs; and if none ſhould be then living, to her own right heirs.

THE marriage was duly had, and *M.* died in 1727 without iſſue by *D.*

1712. THE ſaid *M.* ſurrendered all the ſaid premiſes holden of the manor of *K.* aforeſaid to the uſe of her will again, but *D.* did not join in the ſaid ſurrender.

1727. *D.* WAS admitted to the premiſes for life under the will of *M.* his wife, ſubject to the reſtraint of waſte; *and under*

under ſuch right hath continued ever ſince in the perception of the rents and profits of the ſame, which are about the yearly value of 25l.

D. PROPOSED a treaty with the ſaid *R. W.* and *J.* for the purchaſe of the reverſion of the ſaid premiſes, at about 100l. each; but no abſolute agreement was carried into execution. 1732.

NOTE, The ſaid *R. was heir at law of the ſaid M.*; he ſurvived her ſix or ſeven years, and died without iſſue, leaving *W.* his eldeſt brother and heir at law; *who, preſuming that the will of the ſaid M. was valid,* and that he was entitled to a moiety of the reverſion of the ſaid premiſes under the ſaid will, after the death of *D. never cauſed any entry to be made thereon* and is now *lately dead* leaving *W.* his eldeſt ſon and heir according to the cuſtom of the ſaid manor.

D. ALLEDGES he paid 100l. part of the conſideration of the ſaid indenture of bargain and ſale.

WAS not the marriage between *D.* and *M. W.* a revocation of her will? and, Did not the premiſes upon her death deſcend to the heir at law? and, Is not the ſaid *W. M. now living* entitled to the ſame at law or in equity? and, Which? *(as D. was admitted thereto only for life, and held the ſame under the ſaid will)* and if ſo, *Can the meſne profits be recovered, and from what time?* If (under theſe circumſtances) *the ſtatute of limitations can be pleaded by D. in bar of relief, both at law and in equity,* Cannot the heir recover the premiſes by a writ of right? and, How and in what manner is the ſame to be brought and proſecuted? If the eſtate ſhould be recovered. Will *D.* be entitled to the 100l. aſſerted to be paid by him upon the purchaſe of the premiſes, and the intereſt thereof at what *per cent.* from that time? and, Can he retain the poſſeſſion of the ſaid premiſes till payment of the ſaid money, and obtain the ſame without accounting for the ſaid profits? Quære.

THE marriage was a revocation of the will, and the premiſes upon her death deſcended to her heir at law; and if *W. M.* is the heir at law, he is entitled. I doubt the ſtatute of limitations will be a bar to an ejectment; but I think the heir may maintain a writ in the copyhold court in the *nature of a writ of right,* a precedent of which, though Anſwer.

though rare, you may find among the ancient records. As there does not appear to be any contract, *D.*'s demand cannot *affect the eſtate* or the *heir at law*; but if there was any written contract, and 100l. paid in part, the eſtate will be affected by it.

N. B. M. W.'s will, and the ſettlement made upon her by her intended huſband, being all made on the ſame day, gives me a ſuſpicion that theſe terms were *agreed upon the marriage*; *and if that appears by any of the writings, though the will was countermanded*, yet a court of equity will compel the performance: a court of equity will relieve and rectify the miſtaken manner of executing what was intended by the parties, *upon any ſmall matter appearing in their favour.*

As a writ of right is the only remedy, the meſne profits cannot be recovered in that action. If poſſeſſion cannot be got without an ejectment, after the judgment in the writ of right, and you afterwards obtain judgment in ejectment, you may recover the meſne profits in an action of treſpaſs from the day of the demiſe in the ejectment; but as the day of the demiſe muſt be ſubſequent to the judgment in the writ of right, that part of the queſtion ſcarcely deſerves the attention of the party.

1750. N. FAZAKERLEY.

R. C.

R. C. by his laſt will and teſtament, bearing date the 11th day of April 1734, after making ſome proviſion by way of jointure, for his wife, and bequeathing the ſeveral annuities and legacies therein mentioned, makes the following diſpoſition, (*viz.*) "I do hereby conſtitute and "appoint the ſaid *W. S.* and the ſaid *F. G.* eſquire, jointly "executors of this my laſt will and teſtament, praying "them to ſee the ſaid jointure and legacies diſcharged and "ſatisfied. I deſire them of my ſaid "daughter *H. C.* the manner they "ſhall appoint and name, to attend and take care of her "education, from time to time, 200l. per annum 'till ſhe "is married with their conſent, or come of age, and to "entail upon her and her iſſue all the eſtate and effects "which ſhall appear to belong to me, after the payment "of the aforeſaid jointure, annuities, and legacies; but in "caſe of her death and failure of her iſſue, I deſire they "will divide my eſtate and effects moietively between my "ſaid nephews *R. C.* and *T. C.*; my intention being, that "the capital be laid out and ſecured, and the intereſt be "made good to my ſaid daughter for her life and to her law-"ful heirs for ever. But in caſe of her and their failure, "the ſame ſhall go to my ſaid nephews, moietively, as "above. Witneſs my hand, at London, this eleventh day "of April, one thouſand ſeven hundred and thirty-four." And by way of reference to or explanation of the ſaid will is ſubjoined at the bottom of it, all in the teſtator's own hand-writing, an inventory of all his eſtates and effects; in which, amongſt other things, is mentioned as part of his ſaid eſtate or effects, an annuity or yearly ſum of 1000l. from the Crown, which annuity took its riſe in this manner: —— William earl of Kinnoul having, in his life-time, had a grant in fee made to him of the Caribbee and other iſlands by king Charles I. afterwards ſurrendered his title thereto to king Charles II.; in conſideration of which ſurrender king Charles II. by letters patent bearing date the 19th day of July in the 24th year of his reign, did (among other things) grant unto the ſaid earl of Kinnoul, and his heirs, one annuity or yearly ſum of 1000l. payable quarterly out of his majeſty's revenue of four and an half *per cent.* at Barbadoes, either as the ſame ſhould come

CASE II.

A teſtator, by his will, "directs his executors to entail upon his daughter and her iſſue all the eſtate and effects which ſhould belong to him after the payments therein mentioned. But in caſe of her death, and failure of iſſue, he deſired the ſame to be divided between *T. L.* and *J. L.* his intention being, that the capital ſhould be laid out and the intereſt made good to his ſaid daughter for her life, and to her lawful heirs forever—but in caſe of her and their failure, the ſame to go to ſaid *T. L.* & *J. L.* The ſeveral OPINIONS of Mr. MURRAY, Mr. FAZAKERLEY, Sir D. RYDER, and Mr. BOOTH, Whether a court of equity would direct the teſtator's property to be ſettled upon the daughter and her iſſue, in ſtrict ſettlement, ſo as to let in the ſubſtitutionary intereſt during perſonalty? taken to be

legatees, upon the failure of the iſſue? Whether the accumulation of the daughter's minority would be conſidered as part of the capital of the ſaid, Whether a perſonal annuity in fee belonging to the teſtator, would be compriſed in the diſpoſitions made by his will?

come into the receipt of the exchequer, or by levying tallies of aſſignment upon the farmers or collectors of the revenue for the time being, notwithſtanding any previous debt or incumbrance upon the ſame. And therein is a clauſe, that if the ſaid revenue of four and an half *per cent.* ſhould fall ſhort, or not fully anſwer or pay the ſaid annuity of 1000l. to the ſaid earl of Kinnoul, his heirs and aſſigns, then his majeſty doth thereby for himſelf, his heirs and ſucceſſors, declare and grant that the ſame ſhould be fully made up and duly and punctually paid unto the ſaid earl of Kinnoul, his heirs, executors, and aſſigns reſpectively, out of any other the treaſures of him, his heirs and ſucceſſors, at any time being or remaining in the receipt of his or their exchequer —— with the uſual directions to the commiſſioners of the treaſury, and other the officers of the exchequer, for the due payment of the ſaid annuity; and the ſaid annuity was afterwards aſſigned over to *A.* in truſt for the ſaid teſtator and his heirs.

THE next thing to be obſerved is, that though the ſaid will be duly ſigned by the teſtator, and all in his own hand-writing, and has long ſince been duly proved, yet it is not atteſted, purſuant to the ſtatute for preventing frauds and perjuries. And it muſt alſo further be obſerved, that this ſtatute has never yet been enacted in Barbadoes: and laſtly, that real eſtates in that and the other Leeward Iſlands, are by an act of parliament made here in England, in the beginning of his preſent majeſty's reign, and before the death of the ſaid teſtator, become as much aſſets as any perſonal eſtate to diſcharge debts even by ſimple contract.

1. Quære. WHETHER the ſaid annuity, as charged upon the ſaid revenue of four and an half *per cent.* in Barbadoes, can be conſidered as an eſtate or hereditament in the iſland, and be at all affected by the ſaid will, in regard the ſame is not atteſted by three witneſſes?

Anſwer. I THINK this annuity is an hereditament in Barbadoes, as the fund on which it is charged ariſes there, though it is payable either after that revenue comes into the exchequer here, or by anticipation before it comes thither, and while it remains in the hands of the collectors or farmers; and as the ſtatute of frauds does not bind in Barbadoes, I apprehend the will, though not atteſted by three witneſſes, does affect this annuity; but I cannot ſay this is a clear point.

AND

AND if it is, how far the words directing the executors to entail upon his daughter and her iſſue all the eſtate and effects which ſhould appear to belong to him after the payment of the ſaid jointure, annuities, and legacies, ſhall by implication raiſe a truſt for paying out of it the jointure, annuities, and legacies, before-mentioned, and given by the precedent part of the ſaid will? 2. Quære.

I APPREHEND the jointure, annuities, and legacies, are charged upon this annuity as well as on the teſtator's perſonal eſtate. Anſwer.

WHETHER the ſaid annuity, or produce thereof, can be conſidered as aſſets for the payment of debts due on ſimple contract here in England. 3. Quære.

I CONCEIVE this annuity and the produce is liable to debts on ſimple contract here in England. Anſwer.

D. RYDER.

As moſt of the teſtator's effects do conſiſt of perſonal eſtates, Is the bequeſt thereof to his two nephews void in point of law, as being to take effect on ſo remote an event as a general failure of iſſue of *D.* the daughter, whereby the ſole and entire property thereof may be conſidered as being abſolutely veſted in her the ſaid *D.* the daughter? or, Will a court of equity, in regard to the teſtator's directions to his executors to entail theſe effects, order the ſaid effects to be ſo ſettled as that the daughter ſhall take a leſs beneficial intereſt therein, by way of having only the intereſt or profits ſecured to her for her life, ſo as to let in a limitation to her children and to the ſaid nephews after her death? and in caſe it ſhould be directed that *D.* the daughter ſhall only have the intereſt or profits for her life, and that a limitation ſhould be inſerted in the ſettlement in favour of the children, Will a court of equity conſider theſe effects as lands, or take the teſtator's meaning to be, that his perſonal eſtate ſhould be laid out in land, ſo as that it ſhall be limited to the firſt and other ſons ſucceſſively, and then to daughters? or, Muſt it be limited to all the children equally, and for what eſtate or intereſt; or, In what other manner will a court of equity direct the ſettlement to be made, ſo as to be moſt agreeable to the intention of the teſtator? Further Quæres. 1. Quære.

I AM

Anſwer. I AM of opinion, that there is no direction to lay out the teſtator's perſonal eſtate in land; on the contrary, he conſiders the reſidue, bequeathed for the uſe of his daughter and her iſſue as a capital to be placed out at intereſt. The limitation to the nephews of perſonal eſtate, I think, is void, being too remote; and I am of opinion the daughter is intitled to the whole. The ſettlement which the teſtator has directed his executors to make upon her and her iſſue, in point of law, will veſt the property in her; and I do not ſee that they have any power to make a ſtricter ſettlement, in order to avoid this legal conſequence. There is no direction to entail it as far as by law they may; but his intention was, that it ſhould go to her and her iſſue; and upon failure of iſſue at any time, then to his nephews.

2. Quære. As the intereſt and annual profits of the eſtate during the minority of the daughter, over and above the annuities, and the allowance to her of the 200l. *per annum*, have amounted to a conſiderable ſum, Will *D.* the daughter, on her marriage or coming of age, be intitled thereto abſolutely as her own property? or, Ought the ſame by the words and intent of the will to go together, and be conſidered as part of the capital of what is to be comprized in the ſettlement ſo to be made as aforeſaid?

Anſwer. I AM of opinion, that though it ſhould be conſtrued, that the executors may ſettle the perſonal eſtate upon the daughter barely for life, with limitations to her ſons and daughters, yet ſhe is intitled to all the annual profits and produce abſolutely.

3. Quære. *L.* the teſtator having no other real eſtate ſave the ſaid annuity (the profits whereof ſince his death have amounted to a conſiderable ſum), and ſave about 100l. *per annum* in the county of *H.* the queſtion which ariſes is, Whether the ſaid annuity ſhall be taken as land or as perſonal eſtate? and, Whether when the court comes to direct a ſettlement, it will order the ſaid annuity to be ſettled either firſt upon *D.* the daughter in tail, remainders to the nephews in fee; or elſe upon the daughter for life, with remainder to truſtees to preſerve contingent remainders

ders; remainder to the firſt and other ſons of the ſaid *D.* the daughter in tail male ſucceſſively, with remainder to her daughters in tail equally, with remainder to the nephews in fee? or elſe, Will it be directed to be ſettled after *D*'s death to all her children equally, with any and what contingent limitation to the nephews, in caſe of there being on ſuch childrem, or their failure of iſſue at any and what particular time? and alſo, In what manner the land in the county of *H.* is to be ſettled?

THESE matters, which were not fully found out when the Firſt Part of this Caſe was drawn, will fall under your conſideration in the Anſwers you ſhall give to the Firſt and Second *Quæres*.

AS the Will is ſtated, I ſee no words by which this annuity or any real eſtate is deviſed to the executors; but if it is, the direction to entail it on the daughter and her iſſue muſt, I think, be carried into execution by limiting the ſame to her and the heirs of her body. Anſwer.

May 2, 1743. W. MURRAY.

THIS Will is very inaccurately worded, and leaves room for ſuch doubts as will make it neceſſary to reſort to a court of equity to give directions for the due execution of the truſts of this Will. MR FAZAKERLEY'S Anſwer to the Firſt Quære.

As to the real eſtate (if any), I do not think this clauſe of the Will extends to it, unleſs an intention for that purpoſe can be collected from ſome other part of the Will; for no intereſt is veſted in the executors as to the real eſtate; but the perſonal eſtate is veſted in them, as executors, for the ends and purpoſes of the Will. And I think it is proper to confine the conſtruction of this clauſe to ſuch eſtate as is veſted in them by law, which they may ſettle as directed by the Will, without giving them a power to ſettle what is not veſted in them either in law or equity.—*Quære*, If the real eſtate or any part of it be in jointure? If it be,

be, I think the general words will extend to the real as well as to the perſonal eſtate; and in that caſe I think the real eſtate muſt be carried into ſtrict ſettlement, making the daughter only tenant for life, with remainders amongſt the children, and with a remainder in fee to the nephews, as tenants in common.

As to the perſonal eſtate, I am of opinion that the limitation to the nephews is not void; but this being an executory truſt, it ought to be carried into execution in ſuch a manner, and with ſuch limitations, as will anſwer all the parts of the teſtator's intention as near as the law will admit of, by limiting the eſtate to the daughter for life, and after to the children; with croſs limitations, in caſe of any of the children's deaths without iſſue before twenty-one; and if all of them ſhould die before twenty-one without iſſue, then to the nephews. Perhaps, in this part of the caſe, the directions of a court of equity will be principally wanting, not only in general, but in particular, whether the children are to take the whole in ſucceſſion, or elſe they may take it generally as above. There does not ſeem to me to be any authority to inveſt the perſonal eſtate in lands, or to conſider the ſame in the nature of real eſtate.

Mr. FAZAKERLEY's Anſwer to the Second Quære.

I DO not think the ſurplus profits of the perſonal eſtate ought to be accumulated till the daughter comes of age, and then to be ſettled, with the reſt of the perſonal eſtate, as directed by the Will. For the ſettlement is not, by any directions in the Will, to be poſtponed till the daughter attains her age of twenty-one, or marries; and therefore the daughter is to have the ſame benefit as if the ſettlement had been made upon her father's death, ſubject to the payment of the jointure and annuities, and therefore ſhe will be intitled to the ſurplus of the profits annually ariſing out of the perſonal eſtate; and as the ſame grew due,

due, they became the daughter's abſolute and ſeparate property, as a fruit fallen from the bulk of the perſonal eſtate, which is directed to be ſettled: and I do not think the 200l. a year interferes with this opinion; for that is a direction in the clauſe appointing the guardians how much they were to allow for her maintenance; and the ſurplus may be employed and improved for her benefit. But this point will likewiſe be proper for the direction of the court.

Mr FAZAKERLEY's Anſwer to the Third Quære.

I AM of opinion, that this annuity will not be taken as perſonal, but as real eſtate of inheritance; and that being ſo, it ſeems to me that it is not affected by the Will, but deſcended to the heir at law. However the Will is ſo very doubtful throughout, that I think it proper to be put in iſſue, for the direction of the court: and if the court ſhould be of opinion that this annuity falls within the general words, it ſeems to me that the court will direct it to be carried into ſtrict ſettlement to the daughter for life, in truſt to preſerve contingent remainders, and the uſual ſucceſſive limitations to her iſſue in tail, with remainder to the nephews in fee, as tenants in common. The lands of inheritance muſt be ſettled in like manner, if they be ſubject to the Will, which I do not think they are; and if not, the ſame will deſcend to the heir at law.

Mr. D. RYDER's Anſwer to the Firſt Quære.

THIS is a very doubtful queſtion; but conſidering that this is merely executory, I am inclined to think a court of equity would direct this eſtate to be ſo ſettled that the daughter ſhould have an intereſt for her life in it, with remainder to the firſt ſon living at her death abſolutely; or if no ſon, then to the daughters that ſurvive her abſolutely and generally between them. But as that appears to me ſubject to very great doubts, I ſhould think it not adviſeable for the executors to make any ſettlement of it without the directions of a court of equity.

I THINK

Mr. D. Ryder's Anſwers to the Second

I THINK the ſurplus profits will be deemed part of the capital, to be ſettled according to the Will, not belonging abſolutely to the daughter.

and Third Quæres.

I THINK this annuity ſhall be taken as real eſtate, and be ſettled on *D.* the daughter in tail, with remainder to the nephews in fee, as tenants in common. The land in the county of *H.* I think ſhould be ſettled in the ſame manner: nor is it uncommon to have the ſame words in a Will conſtrued in a different manner with reſpect to the real and perſonal eſtate, in order to make the Will have effect as to both.

Mr. J. Booth's Anſwer to the Firſt Quære.

IF this were the caſe of an immediate deviſe, ſo as that the parties muſt neceſſarily take under the Will, without any thing more to be done, there would then be room to argue, that the limitation to the nephews was bad, as depending on a general failure of iſſue at any time, and therefore not to be endured, as being too remote, and tending to a perpetuity; and yet, even there, all the late caſes ſhew, that courts of equity will now always lay hold of every the leaſt turn of expreſſion to tie up the teſtator's meaning to a failure of iſſue at the time of the death of the deviſee for life, and this purely in order to give effect to the meaning and intention of the teſtator. But in the preſent caſe, the Will is not what the parties are to claim from, but the teſtator refers to a more deliberate act, an entail to be made by his executors; ſo that here, the Will is only directory, the teſtator having in his view a further ſettlement to be made purſuant to his intentions, of which he gives his executors nothing but the minutes by his Will, leaving it to them to carry it into a more complete execution afterwards by proper artificial words. The caſe of lord Glenorchy and Boſville, upon the Will of ſir Thomas Pearſhall, lady Glenorchy's father, went exactly upon this reaſoning; only that was upon a will

that

that related to land, and this relates only to money and perſonal eſtate. In that caſe, which was heard in chancery in February 1733-4, my lord Talbot directed lady Glenorchy to be made tenant for life, with remainder to truſtees to preſerve contingent remainders; with remainder to her firſt and other ſons in tail male; with remainder to all the daughters, as tenants in common in tail; with croſs remainders; with remainder to the Boſvilles and others. Now here, as the bequeſt is of money, I think the ſettlement intended by the teſtator cannot be ſuppoſed to be intended to be exactly conformable to ſettlements of land, ſo as to let in the eldeſt ſon preferably to the other children; for the teſtator has not directed his money to be converted into land: and where ſettlements are made of perſonal eſtate, eſpecially where a huſband marries a woman entitled to a portion in the hands of truſtees, and he cannot make an adequate ſettlement, but is ordered out of that portion to make a proviſion for *his wife and her iſſue*; there the huſband is firſt made to take for life, and then the wife for life; and then all the children are made to take equally with maintenances, whilſt under age; and if there are no children, or being ſuch if they die under age, then back again to the huſband, his executors and adminiſtrators. In the preſent caſe, there are no words at all in the will intimating in the leaſt that the nephews are to be let in, if the children of the teſtator's daughter die under age; and in thoſe caſes I have mentioned, that limitation ſtands upon this, That no proviſion is to be made for any children but ſuch as may want one; and children dying before that age, can ſtand in no need before of any of the proviſions beſides maintenance. But here the nephews are to have no right, unleſs the daughter has no iſſue at all. I think, therefore, the ſettlement muſt be ſo framed, as that the whole effects, &c. may be veſted in truſtees, in truſt to pay the intereſt to

the daughter for her life; and if ſhe has any children, to ſtand intereſted in the capital in truſt for ſuch children, their executors and adminiſtrators; ſuch children to take equally, if more than one: and if there ſhall be no child or children of *D.* the daughter, then in truſt for the nephews equally, their executors and adminiſtrators.

Mr J. Booth's Opinion on the Second Quære.

AS the teſtator has expreſſed his intention to be, that all the eſtate and effects that ſhall appear to belong to him, *after the payment* of the jointure, annuity, and legacies, and not ſooner, ſhall be entailed in the manner mentioned in his will; and if the allowance of 200l. a-year to the daughter, till her marriage or coming of age, may be well conſidered as a ſpecies of a legacy or bequeſt; I am inclined to think, conſidering the ſubſequent words, where he joins the capital and intereſt together, that this amounts to much the ſame as if he had ſaid, *and all the reſt and reſidue of my eſtate and effects, after payment of the aforeſaid jointure, annuities, legacies, and ſums of money, I direct to be entailed*; which words *reſt and reſidue* have by ſome late caſes, and particularly that of Green and Ekins, heard the 8th of December laſt in Lincoln's-Inn Hall before the preſent lord chancellor, been held to carry the intereſt and profits accrued due after the teſtator's death as well as the principal, ſo as to make ſuch intereſt and profits, till the title of the firſt taker ſhould commence, accumulate for the benefit of all the perſons claiming under the will. But though this is the Opinion to which I incline, yet I cannot but ſay, that I have great doubts with me upon this queſtion, becauſe the allowance to the daughter may be well ſaid not to fall under either of the words "jointure, annuities, or legacies," there being other parts of the will, and other bequeſts, that anſwer to all theſe words; and wherever profits and intereſt-money are to accumulate, and be laid up, the intention of the teſtator ought to be very clear.

I HAVE

Mr. BOOTH's OPINION on the Third Quære.

I HAVE looked into the will, and I find there are no witneſſes thereto; ſo that it may be a queſtion, Whether this annuity paſſes thereby? the will not being executed according to the ſtatute of frauds and perjuries: but nevertheleſs, I think, the annuity paſſes thereby; for the ſtatute requires three witneſſes only to deviſes of lands and tenements. This annuity is not a tenement; it is an hereditament; but the word hereditament is or ſeems to be purpoſely left out: and it is not at all extraordinary that the compilers of this ſtatute ſhould put perſonal inheritance upon the ſame footing with perſonal eſtates, and require no greater ſolemnity as to wills of the one than of the other. I find it is doubted whether the words *eſtate and effects* will carry this annuity, becauſe nothing was meant to paſs thereby but what would produce intereſt, and that could be nothing but perſonal eſtate. But I think, it paſſes by the words *and intent*, it being *all that ſhould appear to belong to him*; and in a ſchedule, all of the teſtator's own hand-writing, proved with this will, this annuity, by the name of *his Barbadoes annuity*, is particularly mentioned. Then, as to the Queſtions ſtated in this *Quære*, I think this annuity, being an hereditament, will be directed, ſo far as the rules of equity will admit of, to be ſettled as land; and that the ſettlement to be made thereof will be, by way of ſtrict entail, to miſs Cantillon for life; remainder to truſtees to preſerve contingent remainders; remainder to her firſt and other ſons, and the heirs of their bodies; with remainder to daughters, and the heirs of their bodies; with croſs remainders; with remainder to the nephews in fee; but the eſtates tail, which the ſons and daughters will take under theſe limitations, will not be eſta es within the ſtatute *de donis*, nor can there be any recovery thereof; but after iſſue had, the annuity will be alienable by the takers of thoſe eſtates tail therein, who will plainly be within the laſt-mentioned ſtatute.

CASE. 12.

June 2, 1753.

Mr. WILBRAHAM's OPINION on the Queſtion, How truſtees ought to act under a will where teſtator is indebted to the crown, and the *ceſtui que* truſt are infants?

SIR *H. H.* by will gave to his brother *E. H.* 30l. a-year for life; to his brother *H.* 30l. a-year for life; to his ſiſter *S. W.* 30l. a-year during the joint lives of her and —— *W.* mother of her late huſband *J. W.* Clerk, deceaſed; to *H. W.* his houſekeeper, 30l. a-year for life; to his grandſon *C. D.* 100l. a-year for his life; and to his grand-daughter *S. D.* 30l. a-year until ſhe attains the age of twenty-one; and after ſhe ſhall attain that age, 60l. a-year for her life; and charged or chargeable with the ſeveral annual rents or ſums of money aforeſaid, and ſubject thereto, he gave and deviſed unto ſir *E. W.* of Llangoyd Caſtle in the county of *B.* baronet, and *P. W.* of Pen Pont in the ſaid county of *B.* eſq. and their heirs, all and every his freehold manors, meſſuages, lands, tenements, tithes, and hereditaments, ſituate, lying, ariſing, and being in the counties of Radnor and Brecon and elſewhere, to hold the ſame unto the ſaid ſir *E. W.* and *P. W.*; and the ſurvivor of them, his heirs and aſſigns, ſhould and might, from time to time, receive the rents, iſſues, and profits, of the ſaid manors, meſſuages, lands, tenements, tithes, and hereditaments; and after payment of all neceſſary and uſual outgoings for taxes and repairs, and the ſalary of a receiver to be appointed as thereinafter mentioned, to the intent that his ſaid truſtees might retain to their own uſe the yearly ſum of 10l. for their care and trouble in auditing the receiver's accounts, and the management of the truſts in them thereby repoſed; and ſubject thereto, in truſt, in the firſt place, to pay the ſeveral annuities by him given as aforeſaid, and then to apply the reſidue of the ſaid rents and profits, as often as they ſhall be accumulated, and amount in their hands to the ſum of 100l. or more, to pay and diſcharge ſuch debts by him owing at his deceaſe, what his perſonal eſtate falls ſhort to pay. And for the eaſe and aſſiſtance of his ſaid truſtees in the management of his ſaid eſtate and truſts aforeſaid, he did thereby will and direct, that they ſhould appoint a proper perſon to be a receiver of the rents and profits of his ſaid eſtates, and to allow him ſuch ſalary as they ſhould think fit; and that in the choice and appointment of ſuch receiver, his ſaid truſtees ſhould always have reſpect to his next of kin not entitled to his ſaid eſtates by virtue of the limitations

limitations thereinafter directed, who ſhould be willing to accept of ſuch employ, provided that ſuch his next of kin ſhould not be a clergyman, a ſoldier, or an attorney. And in caſe any perſon ſo employed as a receiver ſhould in the opinion of his ſaid truſtees be negligent or unfaithful in the truſt repoſed in him, that then from time to time his ſaid truſtees ſhould diſcharge him, and appoint ſome other perſon to be receiver in his room; always having reſpect to his next of kin as aforeſaid. And he did thereby moſt humbly requeſt his ſaid truſtees, yearly and every year, to deliver an account in writing unto the perſon who for the time being ſhould be next entitled to his ſaid eſtate by virtue of the limitations thereinafter directed, or to his or her guardian, in caſe of minority of ſuch perſon, of or concerning all the rents by them received, and the application thereof, and of the rents then in arrear, and of his debts then remaining unpaid; ſo that ſuch accounts might not by any means go into the court of chancery. And when the truſts aforeſaid ſhould be performed and ſatisfied, and not before; then upon this future truſt that they the ſaid *E. W.* and *P. W.* or the ſurvivor of them, his heirs or aſſigns, ſhould and might convey, ſettle, and aſſure, his ſaid manors, meſſuages, lands, tenements, tithes, and hereditaments, to the ſeveral uſes, and ſubject to the proviſoes and the powers thereinafter mentioned, declared, and expoſed; (that is to ſay) to the uſe and behoof of his grandſon Edward Maynwaring Davies and his aſſigns, for and during the time of his natural life, without impeachment of or for any manner of waſte; and from and immediately after his deceaſe, to the uſe and behoof of the firſt and every other ſon and ſons of the body of the ſaid *E. M. D.* lawfully to be begotten; with divers remainders over. Provided alſo, and he did declare his will to be, that if Chamberlain Davies, the father of him the ſaid *E. M. D.* ſhould happen to ſurvive him, and ſhould at any time after his deceaſe take upon him the guardianſhip of his ſaid grandchildren *E. M. D. C. D.* and *A. S. D.* or any or either of them; or ſhould by any ways and means whatſoever or howſoever intermeddle with the management of their or any of their perſons or eſtates, otherwiſe than as his truſtees or the ſurvivor of them ſhould direct and appoint; that then and in ſuch caſe the ſeveral eſtates therein directed to be limited to his ſaid granchildren, and to their firſt and every other ſons in tail made as aforeſaid,

ſaid, ſhould from thenceforth ceaſe and determine: and his ſaid manors, meſſuages, lands, tenements, tithes, and hereditaments, ſhould go and remain to the perſon next intitled in remainder by virtue of the limitations aforeſaid, in ſuch manner as if his ſaid grandchildren were all then actually dead, without leaving any iſſue of their bodies reſpectively. And he did thereby require his ſaid truſtees to be more cautious of the ſaid Chamberlain Davies the father in this reſpect, as he inſerted that clauſe from a conſideration, that the ſaid Chamberlain Davies had treated his daughter who was his unhappy wife, who was a dutiful, accompliſhed, and beautiful woman, herſelf and family, in an unbecoming manner. And as for touching and concerning whatſoever and whereſoever he gave and bequeathed the ſame to his brother *E. H.* and to his ſaid grandchildren *E. M. D.* and *C. D.* in truſt to pay and apply the ſame towards ſatisfaction and diſcharge of his funeral expences, his debts, and the ſeveral legacies by him given, as far as the ſame would extend without ſelling his family pictures, which he willed might remain and be kept hung up at his houſe at Madſlough: and did thereby conſtitute and appoint his brother *E. H.* and his ſaid grandchildren *E. M. D.* and *C. D.* executors of this his will.

Observe, The teſtator has been dead about nine or ten months; but *E. H.* (the only executor who was not an infant) died in his life-time. Sir *H. H.* was indebted to the crown (as it is ſaid) in a large ſum of money, as having been a receiver; and the account is yet open and unſettled. He was alſo indebted by mortgages, judgments, bonds, and ſimple contracts, ſo very deeply, that it is feared his whole real and perſonal eſtates will be near if not entirely exhauſted in the payment thereof, and that the ſame can not be diſcharged with a ſale of the real eſtate.

Note, The ſurviving executors being infants, mr. *H. H.* a nephew of teſtator, and one of the remainder men named in the will, took poſſeſſion thereof; and he together with mrs. Howe, the teſtator's only ſurviving daughter, poſſeſſed the ſtock, crop, and houſehold goods, and have diſpoſed of great part thereof, and have adverti ſed in the public papers for the creditors to give in an account of their demands to them: whereupon the truſtees have requeſted them to deliver in a rent-roll of their real eſtate,

eſtate, and an account of the debts, which they have not complied with; and therefore the truſtees have not as yet intermeddled in the affairs; but if they can with ſafety to themſelves be of ſervice to the infants, they are willing to do what may be in their power towards fulfilling the intention of the teſtator.

MR. Chamberlain Davies the father of the infants is in low circumſtances, has married a ſecond wife, and abſconded ſeveral years; ſo that the infants are in the hands or under the care of mrs. Howe their aunt, who has alſo poſſeſſed herſelf of another undivided eſtate of about 500l. a-year, which was the property of Humphry Mainwaring Howarth, eſq. deceaſed, ſir Humphrey's ſon; and on his death deſcended in moieties to mrs. *H.* and the infants; and mrs. *H.* receiving the whole rents of that eſtate, the truſtees are apprehenſive great inconveniencies may ariſe to the infants, if they permit her to continue ſuch receipts.

WHETHER the truſtees can with ſafety act in the truſt? and, In what manner? and particularly with reſpect to the crown debt; and, How the ſame may be ſettled and aſcertained? 1. Quære.

I HAVE read and conſidered the will of ſir *H. H.*; and finding his affairs ſo greatly embarraſſed, I am under great difficulties how to adviſe the truſtees to act with ſafety; for the teſtator, it ſeems, it is ſuſpected was indebted to the crown at the time of his death, though it is not ſaid in what ſum. He was alſo indebted to private perſons, whether conſiderable or not it does not appear; nor does it appear wha tis the value of his real or perſonal eſtate; ſo that it is difficult to form a judgment on the prudential part of this queſtion. But this is clear, that the crown debt being a debt by bond to the crown, which has the force and effect of a ſtatute ſtaple, is a lien on all his lands; and that all his perſonal eſtate is liable thereto, in the firſt place, before any other ſort of debts. Beſides, the teſtator has made his real as well as perſonal eſtate liable to all ſort of debts; ſo that the truſtees muſt take care that all the rents and profits of his real eſtate are applied, Anſwer

in

in the first place, to the payment of his debts; debt to the crown in this first place, and then other debts: so that the trustees, if they would act in the trust with safety, must first apply to the lords of the treasury to settle the debt to the crown, and to discharge it, for till that is done, they cannot act in this trust with any security. But when a *quietus* is obtained, and the bonds to the crown are delivered up, then they may proceed to act in the trust. But though it was the testator's intent that the trustees should appoint receivers from time to time, and receive the rents, and not bring the estate into chancery; yet as the testator has made all his lands equitable assets, I am afraid it will be impracticable, at least I cannot think it adviseable for them to act in the trust without the direction and indemnity of a court of equity; by means whereof receivers will give security to the court, and then the trustees will not be responsible for them, which otherwise, I think, they may be; for then the assets will be accounted for, both legal and equitable, the debts will be paid in such manner and order as will indemnify the trustees, and in the main may be better for the infants.

2. Quære. As the trustees know of no person who is of kin to the testator qualified for the office of receiver of his estates, Can they with safety appoint any other person a receiver under the power in the will? and, How far will they be answerable for his acts?

Answer. I THINK, that if they can find no relation who will accept this office, yet if they should take upon themselves to appoint receivers, I incline to think, that they would be responsible for such receivers to the infants; because they would be told they should have applied to the court of chancery to have appointed receivers, and then they might have acted with safety.

UPON

UPON conſidering that part of the will which relates to 3. Quære.
the infants' father, pleaſe to adviſe, Whether the truſtees can direct or appoint him guardian to his children, without doing any other act? and conſidering the father's circumſtances, and the clauſes in the will relating to him, Is it prudent or adviſeable they ſhould do ſo? Will ſuch appointment (if the truſtees can do no other act) be conſidered as an acceptance of the truſt? and, How far will they be accountable or anſwerable for the father's behaviours?

THIS is a very obſcure and doubtful clauſe in this will, Anſwer.
and ſeems to be impracticable in its execution; for it is to take away that natural as well as legal power and guardianſhip of the children which the law has inveſted the father withal, and which cannot be parted with by him. The teſtator has ſubjected the children to a forfeiture of their intereſt in theſe eſtates by acts to be done by the father, which is a hardſhip upon them; but I think, that as the teſtator has given the truſtees a ſort of power to enable the father to intermeddle in the management of their perſons and eſtates, I think they may do this: though it can delegate no power to the father to act as guardian, becauſe he has the power already, yet when the father acts by virtue of a power delegated to him by the teſtator's truſtees, then I think that his acting under and within the compaſs of that power will not amount to a forfeiture of the children's eſtates; ſo that they may delegate ſuch power as above to the father; that is, to manage the perſons and eſtates of the children. And as to the power over their perſons, he has it already; and I think it may be proper to give him ſuch power: but ſince the teſtator has ſhewn his diſregard for him, I think it would not be proper over theſe eſtates deviſed to them by the teſtator, or the grandchildren's other eſtates, in regard that they might be reſponſible for his miſbehaviour and miſapplication of the rents and profits of the eſtate. But this is one other

other difficulty which creates a neceſſity, I think, of taking the directions of the court of chancery; or otherwiſe I cannot adviſe them to act in this truſt, or do any act to accept it. And I think, that the giving ſuch power as above would be an implicit acceptance of the truſt.

Lincoln's-Inn, R. WILBRAHAM.
December 11, 1755.

CASE 13.

A leaſehold eſtate is by will given to truſtees, for the benefit of *R. P.* and *S* his wife, for their lives, and the life of the longeſt liver of them; remainder in truſt for the iſſue of *S.* by *R. P.* to be begotten: *and for default of ſuch iſſue* to the executors, adminiſtrators, and aſſigns, of *R. P. S.* dies, living *R. P.* leaving iſſue by him *J.* who alſo died in the life time of *R. P.* leaving iſſue *M. R. P.* by his will appoints *T.* his executor, and dies.—The OPINION of Mr. BOOTH, Whether the leaſehold eſtate belongs to *M.* or the executor of *R. P.*?

AN eſtate, held by leaſe for thirty years, was aſſigned to truſtees for the uſe of *R. P.* and Sarah his wife, for their lives, and the life of the longeſt liver of them; and after the death of the longeſt liver of them, to the uſe of the iſſue of the ſaid Sarah by him the ſaid *R. P.* to be begotten; *and for default of ſuch iſſue*, then to the executors, adminiſtators, and aſſigns, of Richard.

SARAH died, living the ſaid Richard, having iſſue by him one child Jane, who alſo died in Richard's life-time, leaving iſſue one child Mary: Richard is alſo dead, having made a will, and appointed a ſon by a ſecond wife executor thereof.

Anſwer.

WHETHER will this leaſehold eſtate belong to the executor of Richard, or to the daughter or adminiſtator of Jane?

Quære.

THE Caſes of Donne and Miniſield, and Buſy and Hodgſon, go a great way towards the deciſion of this Caſe. If the words *in default of ſuch iſſue* mean, in default of the ſame iſſue being living at the death of the longeſt liver of Richard and Sarah, then by the expreſs words this leaſehold eſtate is to go to the executor of Richard. If they mean, in default of iſſue in being at the time of the

the death of the longeſt liver, or, in default of there ever having been children between Richard and Sarah, then Richard's title and that of the executor fails. And as the expreſs limitation, after the death of the longeſt liver, is to the iſſue of the body of Richard by Sarah, and they had iſſue Jane, who lived to be married, and to have a child, I think, as ſhe fully anſwers the deſcription, a right in nature of a reverſionary intereſt attached in her; and I conceive it will go to her adminiſtrator: and to this I incline, becauſe I do not think that the intent was, that Richard ſhould have this leaſehold intereſt if he had a child that lived to be of age and emancipated, though that child died in his life-time. I therefore think the words *and for default of ſuch iſſue* ought to be conſtrued as if the father had ſaid, "and if there ſhould be no iſſue born of the "ſaid Richard and Sarah *in their life-time*, or being any, "if all *iſſue between them ſhall fail at or before the death of "the ſurvivor of them*, then to the executor of Richard." But this is a Caſe of ſome nicety, and I believe there may be various reſolutions relative to theſe matters. See the Caſe of Stanley and Lee, 2. P. Wms. and Leveſon and Groſvenor, 9th June 1740.

January 4, 1756. JA. BOOTH.

CASE 14.

J. H. gave and deviſed all his meſſuages, &c. unto his nephew James Hall, *for and during the term of his natural life; and from and immediately after his deceaſe, unto the iſſue-male of his body lawfully begotten, his heirs and aſſigns for ever*; the eldeſt of ſuch iſſue-male always to be preferred, and take before the younger: and in default of ſuch iſſue, remainder over.

Lands are deviſed to *J. H.* "for life; and "from and immediately after "his deceaſe, unto "the iſſue-"male of his "body lawfully begotten, his heirs and aſſigns for ever."---OPINION, Whether *J. H* took an eſtate for life or in tail?

IN

OPINION. IN deeds, the word *iſſue* is a word of *purchaſe*, not of *limitation*. In wills, it is conſtrued either as a word of *purchaſe* or of *limitation*, as ſeems beſt to correſpond with the *manifeſt general intent* of the teſtator. In the preſent caſe, the expreſſions from which the teſtator's intent can be collected, ſeem to have an inconſiſtent tendency. That the teſtator intended his nephew James Hall only an eſtate for life, remainder to his iſſue-male as purchaſers, I conceive appears from the expreſs limitation to his iſſue-male *his heirs and aſſigns*, with power to him the nephew to charge annuities for his younger ſons. That he intended all his ſaid nephew's iſſue-male ſhould take in ſucceſſion, I think may be collected from the direction, *that the eldeſt of ſuch iſſue ſhould always be preferred, and take before the younger*. This could not be effected but by conſtruing the ſon to take *ſucceſſively in tail*, which is inconſiſtent with the preceding limitation, *to the iſſue-male, his heirs and aſſigns*. And that the teſtator did not intend his nephew *W.* (the remainder-man) or his iſſue-male, ſhould take the eſtate *till failure of iſſue-male of his brother James*, I think is clear from the limitation over to William and his iſſue being expreſsly confined or poſtponed to the failure of the iſſue-male of James. Now, if the eſtate be conſtrued to veſt in the *eldeſt ſon of James* by purchaſe, I do not ſee how it can poſſibly go to any other ſons; and if not, then, under ſuch a conſtruction, this intention of the teſtator, which ſeems to be a general ruling one, that the eſtate ſhall go to all the iſſue-male of the firſt deviſee before it goes over to a ſecond nephew, will not take effect: nor do I ſee how it can, but by conſidering the deviſe to James as amounting to an eſtate tail. And therefore, though I think it is a very diſputable caſe, yet upon the authority of the Caſes of Robinſon *v.* Robinſon, and Roe *v.* Grew, in both which expreſſions ſtrongly contrary to ſuch a conſtruction were made to give way to the apparent general intention of the teſtator for carrying the eſtate

eſtate though all the iſſue-male of a firſt deviſee for life, by conſtruing the limitation as an eſtate tail to ſuch firſt deviſee; I think myſelf warranted to incline in this Caſe to the opinion, that the deviſee, James Hall, is, in order to effectuate the general intent of the teſtator, to be conſidered as taking an eſtate tail under the limitation to him and his iſſue.

C.

CASE 15.

A teſtator bequeathed unto his ſon *G.* a *meſſuage*, probably leaſehold, then in his own occupation, for life; and after his deceaſe, to *M.* his wife for her life, and after the deceaſe of the ſurvivor, unto the children of *G.* lawfully begotten, or to be begotten, ſhare and ſhare alike. But in caſe *G.* ſhould happen to die without iſſue of his body, remainder over. —OPINION, Whether the limitation over after the failure of iſſue of *G.* was too remote?

TESTATOR bequeaths as follows: I give and bequeath unto my ſon George a houſe and premiſes ſituate, &c. now in his occupation, during his natural life, and after his deceaſe to *M.* his wife during her natural life; and from and after the deceaſe of the ſurvivor of them, I give and bequeath the ſaid meſſuage, &c. unto the children of my ſaid ſon George lawfully begotten or to be begotten, ſhare and ſhare alike. But in caſe his ſaid ſon George ſhould happen to die without iſſue of his body lawfully begotten, then it is limited in like manner to his ſon Robert and his wife, and their children; and if his ſaid ſon Robert ſhould die without iſſue lawfully begotten, then he gives and bequeaths the ſame unto his nephew, and after his deceaſe to his children, lawfully begotten or to be begotten, in ſuch ſhares and proportions as he ſhall direct and appoint.

AT the making of the above will, George had a child then living, which afterwards died in the life-time of the teſtator.

A FEW days after teſtator's death, *M.* (George's wife) died. George afterwards marries his preſent executrix and reſiduary legatee, but never had a child by her.

WHEREVER there is a limitation of a *chattel* to a perſon, *and if he die without iſſue*, the remainder is too remote, not being to take effect till a general failure of iſſue, which may not happen for ſome generations. But where the limitation to ſuch perſon, either indefinitely or for life,

life, is followed by a limitation to his *children* or *iſſue*, that may anſwer the relation of the word *iſſue*, in the limitation over. The words *dying without iſſue*, in ſuch limitation over, have been held to ſignify the *iſſue before mentioned*, and to whom the antecedent limitation over was made. *Vide* Vaughan *v.* Farrer, 1 Vezey 182. And under that conſtruction it ſeems the limitation over is eventually good, not as a remainder *after*, but as an alternative to, or ſubſtitutionary diſpoſition for the limitation to the iſſue, ſhould that fail for want of any ſuch iſſue; as in Higgins *v.* Dowler, 1. P. W. 98. Madox *v.* Staines, 2. P. W. 421. Stanley *v.* Leigh, 2. P. W. 618; and ſeveral others to the ſame effect. And therefore, as there is a limitation in this caſe to *the children* of George Lyde, I incline to the opinion, that the words *die without iſſue*, &c. in the limitation over, are to be conſtrued as referring to the *iſſue before deſcribed*, juſt as if the words had been *die without ſuch iſſue*. Vaughan *v.* Farrer, above cited, ſeems very much in point to the preſent queſtion. There, upon a deviſe of real and perſonal eſtate to one for life, and if ſhe *left children* the whole to ſuch *child and children*, but if ſhe ſhould *die without iſſue* then to other purpoſes, it was contended, that the limitation of the perſonal property was too remote, and that the whole veſted in the firſt deviſee: but lord Hardwicke held the contrary; obſerving, that wherever the general words *dying without iſſue* are mentioned relative to perſonal eſtate, the bequeſt of which is limited ſo as properly to take place, the court has conſtrued them to mean *ſuch iſſue as before deſcribed*. Indeed it is natural enough, when a teſtator gives property to *certain iſſue* by deſcription, and then gives it over in *default of iſſue*, to ſuppoſe he meant in default of *that iſſue* to whom he had before given it. The preſent ſeems a ſtronger Caſe in favour of the limitation over, than that of Vaughan *v.* Farrer; for the above-mentioned conſtruction might in

that

that caſe eventually have given the property over in *excluſion of iſſue*, becauſe the limitation was confined to children whom the mother ſhould *leave*, and ſhe might have left no child, but one or more grandchildren, not falling within the deſcription of *ſuch iſſue as before* mentioned. But here the limitation being to the children, generally, would have veſted in them on their birth; ſo that if there had been any iſſue, they muſt have taken in excluſion of the remainders over. I am therefore of opinion, that as mr George Lyde had no children at the time of teſtator's death nor afterwards, the limitation over, conſidering the word *iſſue* as relating to iſſue mentioned, *viz.* children, is good in event; though had there been a child born after the teſtator's deceaſe, the whole would have veſted in ſuch child, in excluſion of all the limitations over. But ſuppoſing the limitations over were to be deemed too remote, which, for the reaſons I have noticed, I conceive, as the event has happened, they are not; then I ſhould be of opinion, that as the eſtate was limited to George Lyde expreſsly *for his life*, the ſubſequent words, *and if he happen to die without iſſue*, did not enlarge his eſtate as they might have done had the limitation to him been indefinite, but that the remainder in the eſtate belonged to the teſtator's two ſons, Robert and George, as joint reſiduary legatees, according to the opinion of Lord Talbot in Clare *v.* Clare, Caſ. Temp. Talb. 21.

December 15, 1785. C.

CASE 16 Mar. 5, 1725.

E, duke of *K.* deviſed all his fee ſimple hereditaments unto truſtees for 500 years, upon certain truſts therein mentioned; remainder to the uſe of the ſucceeding duke for life; remainder to truſtees and their heirs during his life; to preſerve, &c.; remainder to his firſt and other ſons ſucceſſively in tail male; remainder to lady *G.* for life: remainder to truſtees to preſerve, &c.; remainder to her firſt and other ſons in tail male ſucceſſively; remainder to her daughters as tenants in common in tail; remainder to the teſtator's right heirs.

EVELYN duke of Kingſton, grandfather of the preſent duke, being ſeiſed in fee ſimple of divers manors, lands, tenements, and hereditaments, made his will; and thereby, after giving ſeveral annuities and legacies which he directed to be paid, together with all his debts (except ſuch as he ſhould owe in his entailed eſtates, which were otherwiſe provided for), out of his perſonal eſtate, he gave and deviſed all his fee ſimple manors, lands, and hereditaments, unto the executors for 500 years, upon ſeveral truſts therein mentioned; and ſubject to the ſaid term, he gave and deviſed all his fee ſimple manors, lands and hereditaments, whereof he, or any perſon in truſt for him, had any eſtate of inheritance in fee ſimple in poſſeſſion (except as therein mentioned), to take affect after the determination of a precedent limitation, which ſoon after determined, to the uſe of the preſent duke of Kingſton for his life; remainder to truſtees during his life in truſt to preſerve contingent remainders; remainder to his firſt and every other ſon ſucceſſively in tail male; remainder to the late lady Gower for her life, with the like proviſion to preſerve contingent remainders; and after her death, to her firſt and every other ſon ſucceſſively in tail male; remainder to her daughters in equal ſhares as tenants in common in tail general; remainder to the teſtator's right heirs.

Teſtator dies—lady *G.* dies. The ſucceeding duke afterwards contracted with lord *G.* the eldeſt ſon and heir male of lady *G.* that he the duke ſhould become the purchaſer of the deviſed eſtates, and ſhould pay lord *G.* 21,000l. for his intereſt therein, and that the ſame ſhould be conveyed (ſubject to a term of years for raiſing ſuch ſum) to the ſame duke in fee, freed from the uſes and eſtates limited by the will; and that the duke ſhould ſettle other hereditaments of as great or greater value, to the then ſubſiſting uſes of the late duke's will, other than the eſtate veſted in the ſaid lord *G.* in remainder, and all eſtates thereupon dependent. The ſaid ſucceeding duke and lord *G.* *alone* then applied for and obtained in act of parliament, whereby the deviſed eſtates are veſted in truſtees, freed from the uſes and eſtates of the late duke's will, to the uſe of other truſtees for a term of years, for raiſing the 21,000l. for lord G. and ſubject thereto to the uſe of the laſt mentioned duke in fee. And by the ſame act, certain hereditaments of the ſame duke of equal value are ſettled to the uſes limited by the late duke's will, antecedently to the limitations to lord *G.* for life, &c. and ſubject thereto to the uſe of the ſaid ſucceeding duke in fee, with a ſaving clauſe to all perſons except the ſame duke, his firſt and other ſons, &c the truſtees to preſerve, &c. and the truſtees of the term of years created by the will, the ſaid lord Gower and the iſſue of lady Gower, and the heirs of their bodies reſpectively, and all claiming under the will—The OPINION of Mr. BOOTH, Whether the limitations expectant upon the eſtate tail veſted in lord Gower by the will, are completely barred by this act, without a common recovery having been ſuffered? and, Whether the non-obſervance of certain orders or rules of the Houſe of lords in paſſing this act, will invalidate the ſame?

By

By a decree of the court of chancery, wherein the preſent duke of Kingſton was plaintiff, and lord Gower and others were defendants, after taking notice that the manors, &c. therein mentioned, being part of the premiſes compriſed in the term of 500 years, did then ſtand charged with 11,000l. and upwards, the ſame was decreed to be raiſed by mortgage or ſale of the premiſes compriſed in the ſaid term of 500 years.

The duke of Kingſton being ſo ſeiſed for his life in poſſeſſion (ſubject to the ſaid term of 500 years); with reverſion in contingency to his firſt and other ſons in tail male; with remainder to earl Gower as firſt tenant in tail *in eſſe*, he being the eldeſt ſon of the ſaid lady Gower; with remainder over to his brother and ſiſters; agreed with earl Gower, before any recovery was ſuffered, to bar his eſtate tail or the remainders over; that the ſaid duke ſhould become purchaſer of the ſaid eſtates compriſed in the ſaid term of 500 years, and ſhould pay to the ſaid earl Gower, in conſideration thereof, 21,000l. and that the premiſes ſhould be conveyed and aſſured to and veſted in truſtees and their heirs, free from all the eſtates, uſes, truſts, powers, and limitations deviſed, limited, created, and declared thereof in the aforeſaid will, to the uſe of two perſons, to be named by earl Gower, for a term of 500 years, in truſt, by mortgage, to raiſe the 21,000l. to be paid to the ſaid earl as the conſideration for ſuch purchaſe, and ſubject thereto to the uſe of the ſaid Evelyn duke of Kingſton and his heirs; and that the duke ſhould ſettle and convey manors, lands, and hereditaments, whereof he was ſeiſed in fee ſimple in poſſeſſion, of as great or greater value to ſuch or ſo many of the uſes, truſts, charges, powers and limitations deviſed, limited, and declared by the ſaid will of and concerning the premiſes compriſed in the ſaid term of 500 years, as were then exiſting undetermined or capable of taking effect, other than the eſtate thereby veſted in the ſaid earl Gower in remainder, and all the ſubſequent remainders and reverſions thereupon expectant and depending.

In order to carry the ſaid agreement into execution before any recovery ſuffered to bar the intail and premiſes, the ſaid duke and earl Gower alone, and without the concurrence of any perſon in remainder, applied to parliament for an act, therein ſtating the will, decree and agreement before mentioned; but although earl Gower was qualified and enabled by the law, with the concurrence of

the ſaid duke, to bar, defeat, or extinguiſh the ſaid remainder in tail ſo veſted in him as aforeſaid, and all the remainders and reverſions thereupon expectant and depending; yet as the premiſes which were agreed to be purchaſed by the ſaid duke and conveyed as aforeſaid, did by virtue of the ſaid will ſtand limited after the death of the preſent duke to his firſt and other ſons ſucceſſively in tail male, the premiſes could not be abſolutely veſted in and effectually conveyed to him in fee ſimple, purſuant to and according to the tenor and true meaning of the ſaid agreement without the aid of an act of parliament: therefore, upon the prayer of the duke and earl Gower only, it was enacted, that the ſaid eſtates therein particularly deſcribed ſhould be, and the ſame are thereby veſted in two perſons therein named, freed, diſcharged, and exonerated from all the uſes, truſts, powers, proviſoes and limitations, deviſed, limited, or declared of or concerning the ſame in and by the late duke of Kingſton's will; and it was further enacted and declared, that the truſtees and their heirs ſhould ſtand ſeiſed of the premiſes to the uſes following, *viz.*

(NOTE, It is humbly ſubmitted, that this allegation of the parties being enabled by law (meaning by recovery) to bar the entail and premiſes, is only to ſhew, agreeably to the rules of equity, that after an eſtate tail veſted, it is not neceſſary for the perſons in remainder to appear before the judges and the committee of the lords to give their perſonal conſent to the ſettling an equivalent, in conformity to the ſtanding orders of the houſe, that the judges are to certify that all perſons who may be concerned in the conſequences of the bill have ſigned the petition, and that ſuch conſent before a committee is made perſonally; and the rather, becauſe it is directed by another order, that the eſtate to be ſettled as an equivalent ſhall be of as great or greater value than the eſtate taken out of the ſettlement, and be ſettled to the ſame uſes, ſo that no poſſible injury or prejudice can accrue to thoſe perſons claiming in remainder for want of their perſonal conſent.)

To the uſe of two other truſtees for a term of 600 years, in truſt, by demiſe or mortgage, to raiſe 21,000l. to be paid to earl Gower, his executors or aſſigns, and after the end or other ſooner determination of the ſaid term, to the uſe of the ſaid Evelyn duke of Kingſton, his heirs and aſſigns for ever.

AND by the ſame act divers manors and lands in the county of Nottingham, of equal or greater value, were veſted

veſted in Robert Harper and Samuel Harper, for a term of 500 years, upon the ſame truſts as were declared of the term of 500 years in the before-mentioned will and decree; and after the end or other ſooner determination of the ſaid term, to the uſe of the ſaid Evelyn duke of Kingſton, and his aſſigns for his life; remainder to the ſaid Robert Harper and Samuel Harper (the termor) and their heirs during his life, in truſt, to preſerve contingent remainders; remainder to the firſt and every other ſon of the ſaid duke ſucceſſively in tail male; remainder to the ſaid duke, his heirs and aſſigns for ever.

WITH a general ſaving to all perſons, except the duke of Kingſton and his heirs, and the firſt and other ſons of his body, and the heirs male of the body and bodies of ſuch ſons reſpectively; and the truſtees appointed by the late duke of Kingſton's will to ſupport the contingent uſes and eſtates thereby limited to the ſons of the preſent duke and their iſſue, and the heirs of ſuch truſtees; and the truſtees of the term of 500 years created by the will, their executors and adminiſtrators; and the ſaid earl Gower and the heirs of his body; and the iſſue whether male or female of the late lady Gower, and the heirs of their reſpective bodies; and all and every perſon and perſons claiming or to claim any uſe, eſtate, truſt, intereſt, benefit or advantage of in to or out of the premiſes veſted and ſettled by this act, by virtue of or under the will of the late duke of Kingſton, all ſuch eſtates, rights, and intereſts in to or out of the ſaid premiſes as they had before the paſſing this act.

THE ſum of 21,000l. has been borrowed upon mortgage of the term of 600 years limited by the act.

A. B. hath contracted with the duke of Kingſton for the purchaſe of part of the premiſes in the aforeſaid act of parliament; and in looking into the title, a doubt hath been conceived touching the effect of the act with reſpect to the perſons claiming under the late duke's will in remainder expectant on the determination of the eſtate tail veſted in lord Gower, how far this right and intereſt is bound by the act, as well in the eſtate whereof the uſes are diſcharged by the act, as in the eſtate ſettled in the equivalent, the ſame being limited to the duke in fee-ſimple, and not to the uſes limited in remainder of and in the firſt intailed eſtate, without the conſent or concurrence of the perſons in remainder, and truſtees to ſupport remainders, or previous to the act by common recovery or other due courſe of law barring and extinguiſhing the

eſtate tail and remainder, and extending and converting them into an abſolute eſtate of inheritance in fee-ſimple in remainder in lord Gower, ſubject to the prior limitations to the iſſue male of the duke of Kingſton; and ſuch doubt is conceived for the following reaſons:

FIRST, That a common recovery ſhould have been ſuffered by the duke and lord Gower of the ſettled eſtate, ſo as to have veſted the fee-ſimple in remainder thereof expectant on the death of the duke, and failure of iſſue male of his body, in lord Gower, which reverſion he might have contracted to have ſold to the duke or his heirs; and in that caſe the reverſion in fee in the eſtate agreed as the equivalent might be limited to the duke and his heirs; but it ſeems unreaſonable that without purſuing that method in due courſe of law, the chance which the iſſue of lord Gower and his brother and ſiſters had in the reverſion, as well of the ſettled eſtate as in the equivalent eſtate, ſhould by the act be taken away without their privity or conſent, by a mere allegation only, it being expreſsly contrary to the rule now well eſtabliſhed in chancery with regard to monies veſted in truſtees, and directed to be laid out in lands, and ſettled in ſtrict ſettlement, which is called money land: for there if a tenant in tail, with remainder over, apply to the court by petition to have the money paid him, inſtead of inveſting it in lands to be ſettled, he having a power by recovery to bar the intail and remainder, the court always denies it, unleſs all the perſons in remainder appear in court and conſent to it; as may be ſeen in a number of caſes determined by ſir John Trevor, lord Cowper, and Lord Hardwicke, by reaſon that if a remainder man has but a chance, which cannot be barred but by a recovery, then in regard the tenant in tail might die before a recovery ſuffered, a court of equity, whoſe buſineſs it is to aid the intent of the party, ought not in violation of ſuch intent to decree the payment of the money to the tenant in tail, but to decree it to be laid out in lands, in order that the chance which was intended the remainder man might be preſerved. However, it has been ſaid, that there is a material difference between lands themſelves and monied lands (that is, lands that are to be purchaſed with truſt monies): for in the one caſe a recovery may be ſuffered immediately, and in as ſhort a ſpace of time as an act of parliament can be obtained; and therefore it is idle to ſuppoſe the legiſlature would put the parties under a neceſſity, firſt, to ſuffer a recovery, and then

then to apply for an act to settle an equivalent on the duke and his issue only, which may and is done in one and the same act. But in the other case, a purchase of lands must be completed, a settlement made, and a recovery suffered, which will require a matter of time, and consequently give a greater chance in favour of the persons in remainder, which they ought not to be deprived of.

Secondly, That by a standing order of the house of lords it is ordered, "that no private bill shall be read in "that house until one of the printed copies thereof should "be delivered to every person that should be concerned in "the said bill, before the meeting of the committee of "such bill: and in case of infancy" (which was the case "here) "to be delivered to the guardian, or next rela-"tion of full age not concerned in interest, or in the "passing the said bill;" which order was not complied with.

And another order is, "that when a petition for a pri-"vate bill shall be offered to the house of lords, it shall be "referred to two of the judges, who are forthwith to "summon all parties before them who may be concerned "in the bill."

In pursuance of which last order the bill was referred to two judges, who by their report (after stating the will, decree, contract, and preamble of the bill) certify, that it had been proposed before them, that the estates in Nottinghamshire intended to be settled by the bill in lieu of the said settled estate, were of much greater value than those estates; and that the petitioner the duke of Kingston was then seised in fee-simple of the said estates in Nottinghamshire; and they therefore were of opinion, that carrying the agreement into execution would be to the prejudice of no person whatsoever, but that it would be for the benefit and advantage of the petitioners, and all parties interested in and claiming under the will of the late duke of Kingston: and that it had likewise been proved to them, that the said Evelyn duke of Kingston and Granville, lord Gower, who were all the parties in being that could be concerned in the consequence of the bill, had signed the petition, and they had perused and signed the bill annexed; which they conceived to be proper for the purposes aforesaid; and were of opinion it might be reasonable that the same should pass into a law, if their lordships should so please.

From the words of this report it seems as though all persons in remainder could no way be prejudiced by the bill,

bill, but that they, and all parties interested and claiming under the will of the said late duke of Kingston, were to receive a benefit and advantage therefrom, by reason of the equivalent being settled to the same uses as the settled estate; yet whether from oversight, mistake, or omission, in the judges, or the committee of the lords not knowing the rules and principles of equity, they are, as the act now stands, totally deprived of all right in remainder in the settled estates, without any bar by due course of law, or any equivalent settled on them by the act; and the absolute reversion in fee-simple of both estates is vested in the duke of Kingston, without any recompence in value whatsoever.

THAT in a similar case of a private act, in a purchase made by lord Hardwicke of Peter Leheup, esq. the estate directed to be purchased with the money to arise by sale of a settled estate vested by the act to be sold, there is the same allegation, that the parties had a power by due course of law to bar the entails and remainder; and yet the lands were directed to be settled and limited to such and the same uses as were directed of the settled estate; and there does not appear to be any act or precedent to the contrary.

Quære. THEREFORE, Will the person who has contracted for the purchase of the settled estate, having full notice of the seeming defect of the act, be secure in all events, paying his purchase-money, and taking a conveyance from the trustees of the act, without first seeing that the reversion of the equivalent estate is settled to the uses of the late duke's will, in case any of the persons in remainder should hereafter make an application to parliament to seek redress upon the principles before mentioned? or (as the consideration-money is very considerable), Has the purchaser a right to expect such settlement to be first made of the reversion of the equivalent estate to the uses of the late duke's will, and to have a recovery suffered to bar the remainders before he pays his purchase-money? and, At whose expence ought that to be? and, How is he to act with absolute security to himself?

Is it incumbent on the purchaser to see that the duke of Kingston makes out a clear title in fee-simple to the estate settled as the equivalent, to the satisfaction of the purchaser's counsel?

Answer. WHEN objections are taken by persons of knowledge and experience in business to titles of lands which are of-

fered for ſale, every ſort of attention ought to be paid to thoſe objections, if they appear to be in any degree reconcileable to the principles or grounds of law; but in this caſe I am ſo unfortunate as not to be able to perceive the leaſt foundation or colour for the preſent objections.

In examining a title under an act of parliament, ſo far as ſuch title depends on that act, I apprehend it is only neceſſary to ſearch the rolls of parliament to ſee that ſuch an act is there entered on the record, and that it had the royal aſſent; then to ſee whether the words that create the title are comprehenſive enough to paſs the eſtate; thirdly, to be careful to obſerve all the proviſoes and directions contained in the act, ſo as to proceed conformably thereto; and, laſtly, that the ſaving hath nothing in it to preſerve the rights of thoſe perſons who ought to be bound by the body of the act, or the rights or eſtates of any others who ſhall appear to have any intereſt in the premiſes.

Now here is not the leaſt intimation that this act has not paſſed like all other acts of parliament. If any thing has happened to ſupport the plea of *nul tiel record*, let the moſt be made of it; but if not, it is an act of parliament, and as much one of the laws of this land as *Magna Charta*. Then ſee what are the operating words in the body or enacting part. Why, that the manors of Hanſlop, and many other manors and lands there mentioned, and all other the manors, lands, &c. late the eſtate and inheritance of Evelyn late duke of Kingſton, ſituate in ſuch and ſuch counties, which by his will were given, deviſed, or limited, to the uſes and upon the truſts, &c. therein mentioned, ſhall, from and after the day of June 1759, be ſettled upon and veſted in mr. R. Harper and mr. S. Harper; and the ſame are thereby ſettled upon and veſted in them, their heirs and aſſigns, freed and diſcharged, and abſolutely acquitted, exempted, and exonerated of and from all the uſes, truſts, &c. deviſed, limited,

mited, or declared, in and by the ſaid will of the ſaid Evelyn late duke of Kingſton deceaſed. And then the act ſays to what uſes mr. R. Harper and mr. S. Harper, and their heirs, ſhall ſtand ſeiſed. If there is any thing defective in theſe words, it ſhould be pointed out; but in my ſenſe they are as comprehenſive as words can well be. I think they would not have been fuller and ſtronger if it had been expreſſed, That from and after the day of June 1759, all thoſe manors, lands, &c. ſhould be abſolutely diveſted out of the ſeveral perſons claiming, or to claim, any eſtate or intereſt, in poſſeſſion, remainder, or reverſion therein, under the will of the late Evelyn duke of Kingſton, and from thenceforth ſhould remain in the two meſſrs. Harpers and their heirs, to the uſes therein expreſſed. Weigh the words "exempted, acquitted, "and exonerated," and there can be no doubt but the act, as it is now penned, is tantamount to what it would have been if the others had been uſed. The light at noon-day, with a ſky the moſt unclouded, cannot be clearer. The next enquiry is to ſee whether there is any thing made requiſite by this act for the takers under the uſes thereof to do or perform, in order to entitle themſelves to take and enjoy the eſtates *intended* thereby: but I believe there is nothing of this kind; ſo that what remains is to look into the ſaving. The ſaving is carefully penned; and if any perſon in whoſe behalf theſe objections are made is within that ſaving, then indeed there is danger; for that perſon will not be bound by any of the foregoing clauſes: on the contrary, all his rights, titles, claims, eſtates, and intereſts, will be preſerved and kept entire: but then the words of the ſaving are qualified and circumſcribed, certain perſons therein named being expreſsly ſhut out from the benefit thereof. The words are —"ſaving to the king's majeſty, his heirs and ſucceſſors, "and to all and every other perſon and perſons other "than and except the ſaid Evelyn now duke of Kingſton, "and the ſeveral other perſons therein named, all ſuch "eſtate,

« eſtate, right, title, intereſt, &c. as they had before the « paſſing of the act." Theſe words " other than," &c. are words of excluſion; and by them the iſſue, male and female, of Evelyn lady Gower, and all perſons claiming under the will of the late duke of Kingſton, and alſo his right heirs, are abſolutely debarred from any benefit from this *ſalvo jure*; and ſo the binding coercive part of the act remains in its full force.

But then it is objected, that certain rules or orders of the houſe of lords, with reſpect to the ſummoning all perſons concerned in intereſt to appear and conſent, and with reſpect to other matters, were not in this caſe obſerved or complied with. But ſuppoſing (though not granting) this to be true, it makes nothing towards proving or inferring from thence, that there is any thing invalid or defective in the act of parliament. Theſe rules and orders are eſtabliſhed for the ſake of method, order, and regularity: during ſuch time as private bills are under deliberation before their lordſhips, they ſerve as regulations to their lordſhips in the courſe of their own proceedings; but they are liable to be diſpenſed with and waved whenever they think fit; and the inſtant the houſe has reſolved that the bill ſhall paſs, and ſent it to the other houſe of parliament for its concurrence, all thoſe rules and orders are virtually waved and diſpenſed with, and can have no further force; for the next houſe, to which it is ſent for its concurrence, never aſks or enquires whether the rules and orders of the former houſe are complied with during its progreſs there: all that ſuch next houſe takes care of is, to regulate its further progreſs, whilſt that bill is on its travels there, by the forms, rules, and orders of that houſe: and when it is brought and tendered to the crown for the royal aſſent, there is no enquiry to be made there touching the regularity of what was done by either houſe of parliament whilſt it was before them: it is ſufficient that it is tranſcribed upon the roll, and that it appears there

there that it has paſſed both the houſes of parliament in due form, ſo that nothing remains but for the crown to give it the royal aſſent or reject it. When the royal aſſent is given, it is a complete act of parliament, and of ſuch abſolute force and high authority, that no power on earth, ſave that of another parliament (by the united conſent of king, lords, and commons) can infringe or contradict it, or even ſo much as call it in queſtion. As to all inferior juriſdictions, they are as much bound to ſubmit as the meaneſt ſubject: provided the record is right, they may expound or explain, keeping to the intention of the makers, but not queſtion or impeach what the legiſlature has thought fit to enact as an act of parliament: if there is any grievance or irregularity, that muſt and can be remedied or rectified only by another act of parliament—by an act to repeal the former act.

But I am perſuaded here is no grievance, no irregularity. The duke of Kingſton was tenant for life, with remainder in contingency to his firſt and other ſons ſucceſſively in tail (of which theſe were now in being); with remainder to Granville earl Gower in tail, with remainder to his lordſhip's brother in tail male; with remainder to her grace the ducheſs of Bedford, and her grace's other ſiſters in tail; with reverſion to his grace the duke of Kingſton, as right heir to his grandfather. His grace having conſulted his counſel as to his rights, and thoſe of lord Gower, under his grandfather's will, may be ſuppoſed to have repreſented to lord Gower, that he underſtood by his lawyers that he and lord Gower had it in their power, by concurring in the ſuffering of a common recovery, to bar the whole intail and remainders (except with reſpect to the duke's firſt and other ſons) created by his grace's grandfather's will; and that therefore he the ſaid duke deſired of his lordſhip to fix upon a proper price for his intereſt; and that on his concurring in the forms and ceremonies requiſite in that caſe, his grace would pay

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and ſecure that ſum in ſuch manner as his lordſhip ſhould appoint; that indeed his grace's ſons would not be bound, but that he underſtood by his lawyers, that on his ſettling as good an eſtate by way of equivalent on ſuch (firſt and other) ſons, his grace might have an act of parliament to diſcharge the eſtate compriſed in his grandfather's will from the limitations in their favour; and by that means his grace would have the whole of theſe laſt-mentioned eſtates in his power.

It appears that lord Gower took this matter into conſideration, and fixed upon the ſum of 21,000l. as the price of his lordſhip's concurrence in all that ſhould be requiſite for the carrying of this propoſal into execution; and we may preſume that their lordſhips left it to their lawyers to ſettle by what mode of conveyance all this was to be effected. It cannot be pretended that the doing of this was in their power, and that there was no need of applying to lord Gower's brother and ſiſters for their conſent. Their rights were little better than moon-ſhine, ſince by a common recovery, duly and judiciouſly ſuffered, thoſe rights could be annihilated in a ſhort ſpace of time, namely, before the end of next term after this treaty was completed. As they were obliged to go to parliament, they were adviſed, and rightly adviſed, that to ſuffer four recoveries (for the lands lay in four counties) would be to go to a needleſs expence; for that in a caſe where the parliamentary aſſiſtance was on other accounts abſolutely neceſſary, there the parliament would ſo frame their words, which were to become a law, as to have the ſame force and operation, and to bar all rights that would be barred by a common recovery. This their lordſhips were told, and, I apprehend, very rightly told, and that there were many inſtances of the parliament's having ſo done, and that the practice was founded on very good reaſons. *Fruſtra fit per plura quod fieri poteſt per pauciora* is the rule of equity, reaſon,

reaſon, and good ſenſe; and it is no wonder that the gentleman whom theſe noble lords thought fit to conſult upon this occaſion ſhould govern himſelf thereby, eſpecially as in his own experience, which is known to be very great, he had ſeen frequent inſtances of the parliament's having paſſed bills of this kind. Their lordſhips therefore preſented their petition to parliament, praying an act to effectuate what was propoſed according to their agreement. I have not called for the petition on this occaſion; we may well enough gather from that part of the preamble which immediately precedes the ſupplicatory part of the act what was the effect of the petition. I will venture to affirm, that they laid ſuch a caſe before the parliament as ſhewed that (except with reſpect to the duke's firſt and other ſons) there was not nor could be any perſon on earth that had or could have any right or title to any compenſation or equivalent: for as to thoſe who had any remainder or reverſion ſubſequent to or lying behind lord Gower's eſtate tail, their rights were very trivial and inconſiderable, ſince the duke and lord Gower could, by going to the court of common pleas, and paſſing through the formalities of a mock ſuit, where the lands were to be recovered from them by a fictitious claimant, and where they were to have a recompence in value out of the lands of the cryer (in Utopia) bar and deſtroy all theſe rights in remainder in five minutes, without aſking any leave or conſent from the perſons who had theſe rights in remainder, or any other perſon whomſoever: and upon this ground the petition prayed the legiſlature to paſs a law by which it ſhould be enacted, That in conſideration of the duke's conſent to ſettle his Nottinghamſhire eſtate for the benefit of his firſt and other ſons, for the like eſtates and intereſts as they would have been entitled to under their grandfather's will, thoſe manors and lands that paſſed by the grandfather's will ſhould be quite taken away

away from all thoſe to whom they were given by that will, and ſhould be veſted in the two mr. Harpers, and their heirs, abſolutely, for the purpoſes agreed upon by the now duke and lord Gower in conſequence of their treaty before ſtated. Was not this praying the legiſlature to forego the needleſs and expenſive forms of paſſing recoveries? Was not this praying the houſe of lords to diſpenſe with their uſual orders about ſummoning, or have the conſent of all parties concerned in intereſt? Look into the preamble of the bill, you will plainly ſee that the legiſlature had had ſuch a caſe made out to them as fully proved that the duke and earl Gower were the only perſons who had any material or eſſential intereſt (except with reſpect to his grace's ſons and their iſſue male) in the premiſes; and that if the parliament took care to provide an equivalent for thoſe ſons and their iſſue-male, they conſidered themſelves under no obligation to ſtipulate for any recompence or compenſation for the rights of thoſe whoſe titles and intereſts lay behind the eſtate tail of lord Gower, who, ſo long as he could be ſure of the concurrence of his grace the duke of Kingſton, could by the deſtruction of his own eſtate tail alſo deſtroy and annihilate all thoſe rights and intereſts.

THUS in the preamble the bargain between the duke and lord Gower is ſtated as between two perſons who had a right of concurring together to diſpoſe of and acquire the whole dominion over theſe eſtates, ſave in regard to the duke's firſt and other ſons, and their iſſue-male; and when another eſtate is ſaid to be agreed to be ſettled for them, according to his grandfather's will, the words are, "that the duke has agreed to ſettle manors, lands, &c. "of as great or greater value, to ſuch and ſo many of the "uſes and truſts deviſed and limited by his grandfather's "will, of and concerning the Hanſlop and other eſtates "as were then exiſting, other than the eſtate tail there-"by veſted in the ſaid earl Gower in remainder, and all "the

" the ſubſequent remainders and reverſions thereupon ex-
" pectant." Now in this the parliament expreſsly ſays, that the propoſal made to them is to exclude all thoſe diſtant remainder men out of the equivalent. Why? Becauſe they thought their rights deſerved no attention. The parliament immediately gives the reaſon in theſe words :—" But although the ſaid earl Gower is qualified
" and enabled by law, with the concurrence of the ſaid
" duke, to bar, defeat, or extinguiſh the ſaid remainder in
" tail, ſo veſted in him as aforeſaid, and all the remain-
" ders and reverſions thereupon expectant or depending;
" yet as the ſaid manors, &c. in the counties of Bucks,
" &c. do ſtand limited by the late duke's will to the firſt
" and other ſons of the now duke, after his death, the
" ſaid premiſes cannot be abſolutely conveyed to the uſes
" or effectually veſted in the perſons intitled on the exe-
" cution of the ſaid agreement between the duke and earl
" Gower, without the aid and authority of parliament:
" Therefore be it enacted, &c."—Here would I again aſk, Whether the reaſonableneſs of not attending to the inconſiderable, petty, and indeed chimerical rights of the remote remainder men, and of foregoing the expence and tedioufneſs of thoſe fictitious pleadings and proceedings that muſt otherwiſe be uſed in the ſuffering of four recoveries, are not in this part of the act plainly and clearly preſuppoſed? Conſider, at the ſame time, what I have ſaid about the rights, titles, &c. of the iſſue male and female of Evelyn counteſs Gower, and of the rights of the right heirs of Evelyn late duke of Kingſton, being expreſsly excluded out of the ſaving, and I think you will have no doubt but that the legiſlature hath knowingly, deliberately, and of ſet purpoſe, diſpenſed with all forms and orders of each houſe, and alſo with the needleſs forms of ſuffering recoveries; and by attending only to the ſubſtance of things, and not to particular forms, has made that reaſonable and equitable proviſion that is becoming

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the wiſdom of the high court of parliament, in which the whole legiſlative power reſides. If you aſk me how far this is conſonant to former precedents, I dare confidently anſwer, that I believe upon ſearch you will find many of this kind. The caſe of Mr. Lebeup is not quite ſimilar, becauſe they ſay the equivalent was carried through the whole line of the former claimants. But in 1746-7 I was concerned in ſettling an act for ſale of part of the ſettled eſtate of Henry earl of Stamford, &c. and I am ſatisfied that if you will be pleaſed to conſult that act, you will find that the parliament did there all that they did for the duke of Kingſton and lord Gower by the preſent act now before us: they barred remote remainders, which took effect after eſtates tail, as here, without putting the parties to the expences of recoveries, and expreſsly excluded perſons who might have been barred by recoveries from all benefit from the ſaving. That matter was, by my direction, laid before mr. Harper firſt, and he drew a rough draft of the bill: it came afterwards before me, and I new-formed all the preamble, &c. and alſo the ſaving, in words of my own. Lord chief baron Parker and mr. baron Clarke were the judges to whom it was referred. I dare be certain that my lord chief baron hath before, and ſince, gone through acts of this kind ſeveral times; and his lordſhip's penetration is too well known to make it almoſt impoſſible that ſuch eſſential things as thoſe ſhould paſs under his inſpection through inadvertency.

In the preſent caſe, I believe the reader will be ſatisfied that whatever hath been done on this occaſion under the ſanction of the legiſlature, is now a law, and that it cannot be undone but by a new act to repeal the act by which this law hath been enacted. In a judicial proceeding any default in form is an error, for which the judgment is in the next ſuperior court of juſtice reverſable by a writ of error, or an appeal; but who ſhall reverſe the acts of

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the legiſlature? All that can be done there is, to lay an humble repreſentation before the parliament, by way of petition, ſhewing ſome grievance and praying a repeal. But who is aggrieved here? I know not, unleſs the clerks in the prothonotaries office, or the tipſtaff of the court of common pleas, who may complain of having unjuſtly loſt their fees.

THERE is no analogy between the rules of practice eſtabliſhed in the court of chancery in adverſary ſuits, and the rules and orders of any houſe of parliament for the regulating the proceedings on private bills whilſt they are on their paſſage through the houſe of parliament; but ſuppoſe there was, why is not a tenant in tail's appearance before the high court of par iament, and his deſire and petition to have his eſtate tail, and the remainders dependent thereupon, barred, as ſolemn and effectual a tranſaction as to appear before one of the courts of juſtice in Weſtminſter-hall, and to go through a ſham ſuit there? Is the hand of the moſt puiſſant power of the ſtate too weak for ſuch a purchaſe, when it has done millions of acts of ten thouſand times more conſequence? Beſides, aſk the pleaders in the court of chancery what courſe they take, when they would by bill in behalf of an incumbrancer under a charge bind the inheritance of an eſtate ſtrictly entailed, with many remainders over? Is it not ſufficient to bring the firſt remainder man of the inheritance before the court? and does not a decree in that caſe bind all the remainder men and reverſions? I believe this is the practice, and poſſibly there is ſomething of this kind in this very caſe. The act here mentions a ſuit and decree dated 28th April, 1752, and that by that decree, and a report in purſuance thereof, a charge of no leſs than 11,955l. is fixed upon the eſtate. I would aſk, Whether the inheritance is not bound by this decree? And yet I much queſtion

question, whether any body interested in the inheritance was brought before the court as a party besides Earl Gower.

As to the purchaser's being obliged to look into the title of the equivalent, I see no sort of colour for it in this Case.

Lincoln's-inn, Jan. 28, 1764. JAMES BOOTH.

CASE 17.

On the construction of a will.—With the OPINIONS of Mess. CHETTHAM, PIGOT, D. RYDER, WARD, FILMER, FAZAKERLEY, WILBRAHAM, BOOTH, NORTON, and STANHOPE.

JOSHUA BROWN, gentleman, being seised of a considerable real estate in fee-simple, did, in the year 1694, by his last will and testament (after several particular devises long since determined), give and devise the same unto his nephew William Brown, eldest son of his brother Reginald Brown, and his assigns, for and during the term of his natural life; and from and after the death of the said William Brown, then to the first and other sons of the said William Brown in tail male; and then the will proceeds in these words (*viz.*): "And for want "of issue of the body of the said William Brown, then "*to the second son of my brother Reginald Brown for and* "*during the term of his natural life: and from and after* "*the death of the said second son of my said brother Regi-* "*nald Brown, then to the first son of the body of such se-* "*cond son of my said brother Reginald Brown lawfully be-* "*gotten or to be begotten, and to the heirs male of the body* "*of such second son lawfully to be begotten: and for default* "*of such issue,* to the third, fourth, fifth, and every "other younger son of sons of the body of the said se- "cond son of my said brother Reginald Brown (accord- "ing to their seniority), and to the heirs male of the "bodies of the said third, fourth, fifth, and other sons "of the said second son of the said Reginald Brown law- "fully to be begotten; the eldest of the said son and "sons, and their several heirs male, according to senio- "rity or priority of birth, to be preferred before the "younger of the said sons and their heirs male: and for "want of such issue, to the eldest or next son or sons of "the said Reginald Brown for the time being for the term "of his natural life; and after his and their deaths, to the "heirs male of the body of such eldest and next son of my "said

"said brother Reginald Brown lawfully to be begotten; "the eldeſt of ſuch ſaid ſon and ſons, and the heirs male "of his body, being always preferred before the younger "and his heirs male: and for want of ſuch iſſue, then "to the firſt ſon of my loving brother Samuel Brown for "and during the term of his natural life; and from and "after the death of ſuch firſt ſon of the ſaid Samuel "Brown, then to the firſt ſon of the body of ſuch firſt "ſon of the ſaid Samuel Brown lawfully begotten or to "be begotten; and to the heirs male of the body of ſuch "firſt ſon of the ſaid Samuel Brown lawfully to be be-"gotten: and for want of ſuch iſſue, to the ſecond, "third, fourth, fifth, and every other ſon and ſons of "the ſaid eldeſt ſon of the ſaid Samuel Brown, accord-"ing to their ſeveral ſeniorities, lawfully begotten or to "be begotten, and to the ſeveral heirs males of their ſe-"veral reſpective bodies; the eldeſt of the ſaid ſons and "his heirs male to be preferred before the younger and "his heirs male: and for want of ſuch iſſue, then to "the ſecond, third, fourth, fifth, and each other ſon and "ſons of the ſaid Samuel Brown (according to their ſe-"veral ſeniorities), lawfully begotten or to be begotten, "for and during their ſeveral and reſpective lives; and "from and after their reſpective deaths, to the firſt ſon "of their ſeveral and reſpective bodies lawfully begotten "or to be begotten, and to the ſeveral heirs male of their "ſeveral and reſpective bodies lawfully to be begotten; "the eldeſt of the ſaid younger ſons of the ſaid Samuel "Brown, and his heirs male, always to be preferred be-"fore the younger of the ſaid ſons and his heirs male: "and for want of ſuch iſſue, to the right heirs of me the "ſaid Joſhua Brown for ever. And I do hereby declare, "that the reaſon of my ſettling and limiting my ſaid "meſſuages, lands, and hereditaments, as aforeſaid, is, "becauſe I deſire to have the ſame continue in my name "and blood as long as it ſhall pleaſe God to permit the "ſame."

The ſaid Joſhua Brown the teſtator died ſoon after the making his ſaid will, leaving his ſaid nephew William Brown, who died many years ago without iſſue male, leaving a daughter, who is the teſtator's right heir. The teſtator's brother Reginald had a ſecond ſon called Thomas Brown, who was born after the teſtator's deceaſe, and is now living and in poſſeſſion of the lands compriſed in the ſaid will, and had a ſon, but has now no iſſue male.

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The lands being improvable by building, and Thomas being apprehended to be only tenant for life under the will, about twenty years ago he applied for and obtained an act of parliament to impower him to make building-leaſes of the premiſes; and he is conſidered by the ſaid act as tenant for life only: but now the ſaid Thomas Brown claims an eſtate-tail under the above limitations to the ſecond ſon of Reginald, and after his death, to the firſt ſon of the ſaid ſecond ſon of Reginald, and to the heirs male of ſuch ſecond ſon; and intends to ſuffer a common recovery in order to bar the reverſion that is in the teſtator's right heir, the teſtator's brother Samuel Brown being dead without iſſue male.

WHETHER the limitation to the ſecond ſon of Reginald Brown as tenant for life be good in the creation in this Caſe, there being no ſon *in eſſe* at the time of making the ſaid will, or at the death of the teſtator? Quære.

I CONCEIVE Thomas Brown, ſecond ſon of Reginald, is only tenant for life of the lands deviſed to him in this Caſe; for an expreſs eſtate for life is given to him; and the words *heirs male of the body of ſuch ſecond ſon*, which muſt be owing to ſome miſtake in penning the will, are, as they ſtand in the will, words of limitation of the eſtate given to the firſt ſon of the ſecond ſon of Reginald, and not of the eſtate given to the ſecond ſon; and therefore, I think, cannot be properly tacked or applied to the eſtate for life given to the ſecond ſon ſo as to make it an eſtate-tail; and ſuch conſtruction would be inconſiſtent with the ſubſequent limitation to the other ſons by way of remainder. And I apprehend the contingent remainder limited to the ſecond ſon of Reginald for life is good, and does not tend to a perpetuity in this Caſe; for the contingency muſt happen, if at all, within the compaſs of a life then in being, or within a year after, and would in all probability, as it actually happened, by wearing out with the precedent limitations, and might have been barred if William had had any iſſue male that attained twenty-one years of age: and if Thomas be only tenant for life, he Mr. CERTHAM'S OPINION.

cennot by a common recovery bar the reverſion in fee in the teſtator's heirs at law.

13th *September* 1745. ED. CHETHAM.

Mr. PIGOT's OPINION.

ALTHOUGH Thomas Brown, who is the ſecond ſon of Reginald, to whom the lands were limited in remainder expectant upon the death of William the firſt deviſee without iſſue male, was not born until after the teſtator's death, yet he being *in eſſe* when the particular eſtate determined, I conceive the contingent remainder limited to him for life thereupon veſted in him as ſecond ſon of Reginald, with remainder to his firſt and other ſons in tail-male: and as I am of opinion, that he is only tenant for life of the lands deviſed, with remainder to his firſt and other ſons in tail-male, I conceive he cannot by recovery, or any other act in law, defeat the remainder limited to the right heirs of the teſtator.

30th *September* 1745. J. PIGOT.

Mr. PIGOT's Second OPINION.

I GAVE my Opinion to a Caſe ſtated for mr. Brown. Being in a hurry at the time I was called for it, I miſtook the point with reſpect to the limitations in the will to the ſecond ſon of Reginald and his ſons, which upon peruſal of the will I have ſince diſcovered.

INSTEAD of the limitations being to the ſecond ſon of Reginald for life, with remainder to his firſt and other ſons in tail, as I apprehended when I wrote my Opinion, I find the eſtate is limited in remainder to the ſecond ſon of Reginald for life, remainder to his firſt ſon, and to the heirs male of ſuch ſecond ſon; remainder to the third, fourth, fifth, and other younger ſons of the ſaid ſecond ſon in tail, with remainders over: yet nevertheleſs as the

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eſtate limited to the firſt ſon of the ſecond ſon of Reginald is intermediate betwixt the eſtate for life limited to the ſecond ſon of Reginald and the limitation to the heirs male of ſuch ſecond ſon, I conceive mr. Brown is only tenant for life, and cannot defeat the reverſion in fee, now veſted in mr. Oliver as the heir at law of the teſtator.

4th October 1745. J. PIGOT.

Sir DUDLEY RYDER'S OPINION.

I AM of opinion, that Thomas Brown is tenant for life only, and not in tail; and therefore cannot by recovery bar the remainder or reverſion in fee to the teſtator's right heirs.

11th December 1745. D. RYDER.

Mr. WARD'S OPINION.

I CONCEIVE Thomas Brown has an eſtate for life, and no more; and though the limitations to his firſt ſon, being upon double contingencies, and tending to a perpetuity, may be void as remainders, they will not be conſtrued to make an eſtate-tail in Thomas the ſecond ſon of Reginald.

23d July 1736 J. WARD.

Mr. CRETHAM'S Second OPINION.

I CONCEIVE the limitation in this Caſe to the ſecond ſon of Reginald Brown for life was good in its creation as a contingent remainder, there being a freehold to ſupport it, and no danger of a perpetuity.

I AM of opinion, that the limitation to the ſecond ſon of Reginald Brown for life was good in its original creation, notwithſtanding he was not in being at the death of the teſtator.

I AM of opinion, that the limitation to the ſecond ſon of Reginald was good in its creation as a contingent remainder,

mainder, there being a freehold limited before to William Brown; and that Reginald's ſecond ſon being born before the death of William Brown his brother without iſſue, I conceive the eſtate well veſted in the ſecond ſon of Reginald for life.

2. Quære. WHETHER the words of limitation in the deviſe to the firſt ſon of the ſecond ſon of Reginald, which ſeem to be owing to ſome omiſſion or miſtake, ought to be tacked to the deviſe to the ſecond ſon of Reginald, ſo as to make him tenant in tail? and, Whether Thomas Brown, the ſecond ſon of Reginald, takes an eſtate for life or in tail under the will?

Mr. CHETHAM's Anſwer to Second Quære. THE deviſe to the ſecond ſon of Reginald being expreſsly for life, and the ſubſequent limitations to the third, fourth, fifth, and every other younger ſon of ſuch ſecond ſon in tail by way of remainder, plainly ſhewing the teſtator's intention to be that the ſecond ſon ſhould not take an eſtate-tail, I think the words "and to the heirs male "of the body of ſuch ſecond ſon" ſtanding in the will in the manner they do, muſt be owing to an omiſſion in tranſcribing the will of a deviſe to the ſecond ſon of ſuch ſecond ſon, to which they were intended to be annexed; and therefore I conceive they are not to be tacked or applied to the deviſe to the ſecond ſon of Reginald ſo as to make him tenant in tail; and conſequently I apprehend Thomas Brown takes only an eſtate for life under this will.

March 1746. EDW. CHETHAM.

Sir DUDLEY RYDER's Anſwer to Second Quære. THIS is a plain miſtake, and I think ariſing from the omiſſion of the limitation to the firſt ſon of the ſecond ſon of Reginald, and the heirs male of his body, with remainder to the ſecond ſon of Reginald: but it is clear, that the limitation to the heirs male of the body of ſuch ſecond

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ſon cannot mean the ſecond ſon of Reginald, becauſe the next remainder is, for want of ſuch iſſue, to the third, fourth, fifth, and other ſons, of the ſecond ſon of Reginald: and I am therefore of opinion, that Thomas Brown, the ſecond ſon of Reginald, did not take an eſtate-tail, but for life only.

1ſt December 1746. D. RYDER.

Mr. FILMER's Anſwer to the Second Quære.

I THINK it appears plainly from the whole tenor of the will, that the teſtator intended (after failure of iſſue male of his nephew William Brown, the eldeſt ſon of his brother Reginald) to entail his eſtate upon the firſt and other ſons of the ſecond ſon of his brother Reginald, with remainder over, and never deſigned to put it in the power of the ſecond ſon of Reginald to bar the ſubſequent remainders or the teſtator's heir at law; and therefore, though the will is imperfect, and ſome of the limitations intended cannot take effect (being left out, I fancy, in tranſcribing the will); yet ſuch a conſtruction ſhould be put upon all the parts of the will together, as, conſiſtently with the rules of law, will beſt anſwer ſuch intention. Now the limitation to the firſt ſon of the ſecond ſon of Reginald, and to the heirs of ſuch ſecond ſon (if it were good in the law), is all but one limitation, and muſt in conſtruction be taken all together; and therefore to make theſe words conſiſtent, I ſhould think that the word "ſe-"cond" might be rejected, as repugnant to what went before, and then the limitation will be very conſiſtent, *viz.* to the heirs male of the body of ſuch ſon, which refers to the firſt ſon of the ſecond ſon of Reginald the antecedent.

BUT if the word "ſecond" cannot be rejected, as repugnant to what went before, out of that limitation, yet the teſtator in the next clauſe, I think, has fully explained whom he meant by the words "ſuch ſecond ſon;"

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for the next limitation is to the third, fourth, fifth, and every other younger ſon of the ſecond ſon of Reginald; which plainly ſhews, that by the words "ſecond ſon" mentioned in the precedent clauſe, the teſtator intended one of the younger ſons of the ſaid ſecond ſon of Reginald.

THEREFORE, if I am right in either of theſe conſtructions, the ſecond ſon of Reginald will take no larger eſtate than for his life, as is expreſsly limited to him in the former part of the will.

1ſt December 1746. B. FILMER.

SEVERAL Opinions were taken by mr. Brown upon a ſtate of the Caſe to the ſame effect, to which was ſubjoined the following *Quære*.

Quære. WHETHER is Thomas Brown, ſecond ſon of the teſtator's brother Reginald, who was born after the teſtator's death, tenant for life only, or tenant in tail of the deviſed eſtate? and, May he, by ſuffering a recovery, bar the remainder in fee to the teſtator's heir at law?

Mr. WARD's Anſwer. UPON conſideration of this Caſe, and peruſal of the will, I am of opinion, that Thomas Brown is barely tenant for life, and has no eſtate-tail of which he can ſuffer a common recovery to bar the reverſion in fee. If the limitation to the heirs male of the body of the ſaid ſecond ſon had immediately followed the limitation to ſuch ſecond ſon for life, it might have created an eſtate-tail executed in Thomas the ſecond ſon of Reginald; but as the limitation to the firſt ſon of Thomas for life intervenes, and is immediately followed by the limitation to the heirs male of the ſaid ſecond ſon, this limitation is annexed to the eſtate for life of the firſt ſon; and whatſoever eſtate can be created by it the firſt ſon muſt take by purchaſe; and till there be a firſt ſon of Thomas, theſe limitations to him can take no place, nor make any title againſt William's

liam's daughter, who is heir at law, and will after Thomas's death be intitled ſolely and abſolutely in fee.

23d December 1745. J. WARD.

I AM of opinion, that Thomas Brown is tenant in tail, and may bar the reverſion in fee by common recovery: but it is not a clear Caſe. Mr. FAZAKERLEY's Anſwer.

July 14, 1746. N. FAZAKERLEY.

IT is clear to me, that the difficulty ariſing in the conſtruction of this will ariſes from an accidental omiſſion of a line in the draught, the next foregoing line beginning with the ſame words; for it is plain to me the teſtator intended to make the unborn ſons of his brother Reginald tenants for life, with remainder to their firſt and other ſons in tail male, as well as the eldeſt ſon William, who was *in eſſe*; and therefore, after the limitation to William for life, with remainder to his firſt and other ſons, he goes on and ſays, *in default of ſuch iſſue*, that is, iſſue of William, *to the ſecond ſon of his brother Reginald for the term of his life; and from and after the death of the ſaid ſecond ſon of the ſaid Reginald, then to the firſt ſon of the body of ſuch ſecond ſon of his brother Reginald lawfully begotten or to be begotten*; and then follow theſe words; *and to the heirs male of the body of ſuch ſecond ſon lawfully to be begotten*; which is certainly an improper and an undeſigned limitation; for his intent plainly was to make the firſt ſon of the ſecond ſon tenant in tail, and then to have limited the eſtate to the ſecond, third, fourth, and every other ſon of ſuch ſecond ſon in tail male: but that he has not done, but inſtead thereof, after the limitation to the firſt ſon of the body of ſuch ſecond ſon, he limited the next remainder to the heirs male of the body of ſuch Mr. WILBRAHAM's Anſwer.

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ſecond ſon. But it ſeems plain to me, that this was owing to the miſtake in omitting a line in the draft, taking it up with the ſame word which began the omiſſion; and the words omitted ſeem to be theſe: "and to the heirs "male of the body of ſuch firſt ſon lawfully to be begot-"ten; and for want of ſuch iſſue to the ſecond ſon of "the body of ſuch ſecond ſon of my brother Reginald "Brown lawfully to be begotten;" and then come in theſe words, "and to the heirs male of the body of ſuch "ſecond ſon;" and then the next limitation is, to the third, fourth, fifth, ſixth, and every other ſon of ſuch ſecond ſon of his brother, and to the heirs male of their bodies, &c.: and the will taking up the limitation at the third ſon, plainly ſhews the omiſſion, and reconciles the miſtake and omiſſion: and this reconciles the blunders that have been made; for otherwiſe the firſt ſon would have been only tenant for life, with an abſurd limitation to the heirs male of the body of the ſecond ſon inſtead of the firſt, with remainder to the third ſon of the ſecond, omitting any limitation to the ſecond ſon.

BUT though this be, I conceive, the occaſion of the miſtake, the doubt is, What will be the conſequence or effect of it as the words now ſtand in the will?

AND I take it clearly, that the teſtator intended to limit his eſtate to the ſecond ſon of Reginald unborn, and that he intended to make him tenant for life, with a contingent remainder to his firſt and other ſons in tail. This, I think, is not within the rules of law; for though the law may allow a contingent remainder poſſibly for one life, yet I incline to think, that it will not allow a contingent remainder upon a contingent remainder: ſo that the limitation to the firſt ſon of the ſecond ſon of Reginald, I think, was not legal; for the limitation to the ſecond ſon of Reginald was a contingent remainder; and if the law ſhould allow another contingent remainder to

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be limited upon the firſt, the law might allow another upon that, and ſo on *in infinitum*, which would lock up real property longer than the policy of the law will admit, and would tend to perpetuity.

I THEREFORE incline to think, that the limitation to the firſt ſon of the ſecond ſon of Reginald, which ſecond ſon was not then *in eſſe*, was not a legal but a void limitation. If this limitation be a void limitation, then, leaving out or rejecting it, the limitation will run thus, "to the "ſecond ſon of Reginald for life, and to the heirs male "of the body of ſuch ſecond ſon lawfully to be begotten;" which would, I think, create an eſtate-tail; for wherever an eſtate for life is limited to a man, and afterwards in the ſame conveyance or will there is a limitation to the "heirs of his body" muſt be taken to be words of limitation. And though this was not the intent of the teſtator, but occaſioned, I think, manifeſtly from the miſtake above mentioned, yet as the court cannot ſupply the words above mentioned, and as they do not ſtand in the will, the queſtion is, Whether the court may not incorporate and connect them together in ſuch manner as to make Thomas the ſecond ſon of Reginald tenant in tail?

AND though I think it was not the intention of the teſtator to make him tenant in tail, that is, to apply the words above, *and the heirs male of the body of ſuch ſecond ſon*, to the ſecond ſon, but to the ſon of the ſecond ſon, yet it ſeems to be againſt the rules of law to admit a contingent remainder to the firſt ſon of the ſecond ſon unborn: and as the words now ſtand in the will, I incline to think, that he will be taken to be tenant in tail. Had this been an executory deviſe of money to be laid out in land or lands to be ſettled in this manner, I think that the court would have made him tenant in tail; the court never having gone ſo far as to make any perſon unborn tenant for life, with remainders over to their iſſue.

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THE next conſideration is, What inconveniencies would attend the contrary conſtruction? And it could not be the intent of the teſtator that the limitation ſhould end at his death, and go to the male heir at law rather than to the iſſue male of the ſecond ſon, which it muſt have done, the limitation to his ſons being void, as they were upon too remote contingencies: beſides, if the limitations could have taken effect, the eldeſt ſon of the ſecond ſon would have been but tenant for life, and then the third ſon of the ſecond ſon muſt have taken.

So that upon the whole I incline to think, though probably it was not ſo intended, that Thomas will take an eſtate in tail-male by theſe words.

October 29, 1746. R. WILBRAHAM.

Mr. BOOTH's Anſwer.

THE ſtatute of wills does not go ſo far as to give men an indefinite liberty to deviſe their lands juſt as it ſuits their fancies, but their intentions muſt be agreeable to the rules of law; and one principal rule is, that if there be an expreſs deviſe to any perſon for life, and twenty intervening eſtates, yet if there is at laſt a limitation to the heir or heirs of the body of the firſt deviſee, there the word *heirs* muſt be a word of limitation, and ſo give that deviſee a greater intereſt than at firſt is expreſſed.

THERE is nothing in this Caſe to incline the conſtruction any other way; for the intention of the teſtator was plainly that the male deſcendants of Thomas Brown, the ſecond ſon, ſhould all take; but if you ſay he had only an eſtate for life, you deſtroy that intention: wherefore if ſuch a conſtruction can be made as ſuits both with the teſtator and ſtands with the rules of law, that I conceive ought to be preferred. Now one way of conſidering this deviſe is, to conſtrue the deviſe to Thomas and the words *to the ſecond ſon of Reginald* to mean no more, than to direct

rect the order of ſucceſſion according to the laws of primogeniture; that is, to the ſecond ſon of Reginald, and after him, to his eldeſt ſons and male deſcendants, according to the known courſe and order of ſucceſſion: ſo that I take the words "to his firſt ſon" in this caſe not to be a *deſignatio perſonæ*, but to be rather in nature of words of limitation, explained by the words "heirs of ſuch ſecond ſon;" in which ſenſe the word "ſon" is *nomen collectivum*, as the word *iſſue* in many caſes is ſuppoſed to be: and the words "heirs male of ſuch ſon" are expoſitory, and guide the conſtruction that way, and ſo will veſt an eſtate-tail in Thomas Brown.

But ſuppoſe an intervening eſtate is by the will given to the ſon of Thomas the ſecond ſon of Reginald, at moſt that can be but an eſtate for life; but there are no words of limitation grafted upon the words that denote his perſon. The words of limitation are grafted upon the perſon of Thomas the ſecond ſon of Reginald; and therefore the deviſe to the ſon of ſuch ſecond ſon of Reginald can be but for life; and as a deviſe to the unborn ſon of an unborn ſon has never yet been *ordered*, being a deviſe to a perſon not in any near poſſibility of exiſting, but to one whoſe exiſtence depends upon the remoteſt poſſibility, being a poſſibility upon a poſſibility, it ſeems almoſt no more than an intervening limitation of a remainder for life to a perſon of whom the law takes no notice, and ſo cannot effect rinfluence the conſtruction as to the reſt of the deviſe; like a deviſe to a monk or the man in the moon, in which caſes the will is to be expounded as if no ſuch deviſe had been inſerted. And ſo it is where deviſes are to particular perſons who happen never to exiſt; ſuch intermediate deviſes are never to have any influence on the caſe: wherefore, in the preſent caſe, I think it to be the ſame as if the deviſe had been to the ſecond ſon of Reginald for life, and then to the heirs male of the body of ſuch ſecond ſon; which muſt give him an eſtate-tail, and enable him to

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ſuffer a recovery and defeat the ſubſequent remainder: and I think, in the preſent caſe, Thomas has ſuch an eſtate as will enable him to ſuffer a recovery, and to defeat the reverſion in fee limited to the right heirs of the teſtator. But as this is a will upon which various opinions may be given, I think Thomas would do well to make a leaſe to a friend for ninety-nine years, in truſt for himſelf, before he does any act towards cutting off the intail; becauſe it will be a forfeiture to ſuffer a recovery, if he ſhould be conſidered as only tenant for life; but I think him well intitled to an eſtate-tail.

JA. BOOTH.

On the effect of a recovery.

MR. BROWN, in conſequence of the Opinions in favour of his being tenant in tail, made a grant of his eſtate to a truſtee for a term of ninety-nine years, determinable upon his death, to prevent a forfeiture; and then executed proper deeds for making tenants to the *præcipe*, and ſuffering a recovery thereof; which was accordingly duly ſuffered, and the uſes declared unto or in truſt for himſelf in fee; and he died in November 1762, having firſt duly executed his will, and thereby deviſed the ſaid eſtate to mr. J. Barlow, natural ſon of Sarah the wife of Jeſſon Maſon, his only child and heir at law.

MR. RICHARD OLIVER, who married Iſabella the only daughter of William Brown, and heir at law of the teſtator, now claims the inheritance of the ſame eſtate, under the deviſe in the will of Joſhua Brown to his right heirs.

Quære.

UPON conſideration of the Caſe before ſtated, and the ſeveral Opinions of counſel thereupon, Was the reverſion in fee limited to the right heirs of Joſhua Brown well barred by the recovery ſuffered by Thomas, ſecond ſon of Reginald, or not? and, Are the ſaid Richard Oliver and Iſabella his wife, heir at law to Joſhua the teſtator, or the deviſee of Thomas Brown, intitled to the ſaid eſtate deviſed by the will of the ſaid Joſhua Brown? and, Whether is it more adviſeable for mr. Oliver and his wife to proceed by ejectment or a bill in chancery, in order to bring the point of law and matter of right under this will to a ſpeedy and effectual trial and determination?

I AM

Sir F. Norton's Anſwer.

I AM of opinion, that the reverſion in fee limited to the right heirs of Joſhua Brown, was well barred by the recovery ſuffered by Thomas ſecond ſon of Reginald, and that conſequently the deviſee of Thomas Brown is well intitled in preference to the claim of the heir at law of mr. Joſhua Brown; but there is a queſtion of difficulty, and of ſuch a nature, that I think it would be imprudent to rely upon the opinions of Counſel: and I ſee nothing that can prevent the queſtion being fairly brought befor the court upon an ejectment, which may be done at an eaſy expence. As this is a mere legal queſtion, it is the propereſt method to have it determined.

March 15, 1763. FLR. NORTON.

Mr. Stanhope's Anſwer

THE laſt part of this *Quære* the parties have anſwered themſelves by proceeding in ejectment, upon which a ſpecial verdict is already found. As to the reſt, I am of opinion, that Thomas the ſecond ſon of Reginald was only tenant for life; and that the recovery ſuffered by him did not bar the reverſion in fee veſted in mr. Oliver as heir-general of the teſtator.

I MAKE no doubt, neither does it ſeem to be queſtioned in any of the Opinions above written, that the limitations to the ſecond ſon of Reginald, though not then *in eſſe*, for his life, was good as a contingent remainder, there being a freehold to ſupport it.

THE doubt is, Whether Thomas the ſecond ſon of Reginald did not take an eſtate-tail? and much artificial reaſoning hath been employed to ſhew, that the words "and to the heirs male of the body of ſuch ſecond ſon" may be applied to Thomas the ſecond ſon of Reginald, and conſequently, being words of limitation, give him an eſtate tail; but yet theſe very reaſons admit, that there is an apparent miſtake in tranſcribing the will, and that, from the whole tenour of the will, it is manifeſt the teſta-

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tor intended to give only an eſtate for life to the ſecond ſon of Reginald, with remainder to the firſt and other ſons of ſuch ſecond ſon in tail male. If this then appears to be the manifeſt intent of the teſtator, by what argument of reaſon, by what rule or precedent in law, ſhall this will receive a conſtruction diametrically oppoſite to the apparent intent of the teſtator appearing on the face of the will, eſpecially to the diſheriſon of the heir at law.

But it is ſaid, that the deviſe to the firſt and other ſons of the ſecond ſon of Reginald, ſuch ſecond ſon not being then *in eſſe*, are void, being a contingency upon a contingency, and tending to a perpetuity. Be it ſo; but then this can never be a reaſon for giving an eſtate-tail to the ſecond ſon of Reginald, contrary to the expreſs words and apparent intent of the teſtator.

March 31, 1763. JOHN STANHOPE.

N. B. This Caſe was determined in *B. R.* Hilary Term, 5. Geo. 3. by the name of Chapman *ex dem* Oliver v. Brown and Others, *that it was clearly an eſtate-tail.*

And on the 26th February 1767, this judgment *was affirmed* by the lords agreeable to the unanimous opinion of the judges.—3. Burr. 1636.

Case 18.

On the conſtruction of a will.

CHARLES BAKER being ſeiſed in fee of a conſiderable real eſtate, and having a nephew, Francis, who had two ſons then born (William and Albemarle), and being deſirous to make a proviſion for the younger children of his ſaid nephew, makes his will duly executed, as follows:

"As to my temporal eſtate, I diſpoſe thereof as fol-
"lows:—Whereas I have ſurrendered my copyhold lands
"held of the manor of *A.* and *B.* to the uſes of my will,
"now my will and deſire is, that all my lands and hereditaments, as well copyhold as freehold, ſhould remain
"and continue in the name and blood of my family; and
"therefore

"therefore I give, deviſe, direct, and appoint, all and ſin-
"gular my lands and hereditaments, as well copyhold as
"freehold, *during the minority only of my kinſman Albe-*
"*marle Baker*, youngeſt ſon of my nephew *Francis Ba-*
"*ker*, *unto two truſtees*, upon truſt that out of the rents
"and profits thereof, together with the monies to ariſe
"by ſale of the perſonal eſtate, they ſhould in the firſt
"place pay all his debts, legacies, and funeral expences."
And after payment thereof, then he deviſed and directed the ſurplus of the ſaid rents and profits during the minority only of his ſaid kinſman Albemarle Baker, to be from time to time laid out by his truſtees in the purchaſe of lands, to be by them ſettled to the ſame uſes as the reſt of his real eſtate was thereinafter limited and appointed. And when and ſo ſoon as his ſaid kinſman Albemarle ſhould attain the age of twenty-one years, then he gave and deviſed all his lands and tenements, charged as aforeſaid, unto his ſaid kinſman Albemarle for and during the term of his natural life *ſans waſte*: and from and after the determination of that eſtate, to the uſe of the ſaid truſtees and their heirs during the life of ſaid Albemarle, in truſt to preſerve contingent remainders; remainder to his firſt and other ſons in tail male. And after the deceaſe of the ſaid Albemarle, he gave and deviſed the ſaid premiſes unto the ſaid truſtees during the minority of the next younger, or of any other younger ſon of his ſaid nephew Francis Baker who ſhould be then living, upon the ſame truſts, and with the ſame charges, and to the intent that they might apply the money ariſing by the rents and profits of the ſaid eſtates to the ſame uſes as he had before directed during the minority of Albemarle. And when the next younger ſon, or any other younger ſon, of his ſaid nephew Francis Baker ſhould attain to the age of twenty-one years, he deviſed all the ſaid premiſes to ſuch next younger ſon, or any other younger ſon of his ſaid nephew Francis, who ſhould live to attain the age of twenty-one years, for and during the term of his natural life, without impeachment of waſte; the elder of ſuch ſons to be preferred, and to take before the younger. And after the determination of that eſtate, he gave the ſaid premiſes to ſaid truſtees and their heirs, during the natural life of ſuch younger ſon, in truſt to preſerve contingent remainders. And after the deceaſe of ſuch younger ſon, he gave ſaid premiſes unto the firſt and other ſons of the body of ſuch

next younger ſon who ſhould live to attain the age o twenty-one years, ſucceſſively, in tail male; with remainder to ſaid William Baker the eldeſt ſon for life and to his ſon in tail male; with divers remainder over; with power for Albemarle, and all other th younger ſons, when in poſſeſſion, to make jointures to their reſpective wives.

THE teſtator died without revoking or altering his ſaid will, leaving his nephew Francis, and his great nephews William and Albemarle. Since his death Thomas is born, who, according to the deviſe in the will, is the next younger ſon to take after Albemarle without iſſue, and who has attained the age of twenty-one years. Albemarle is dead without iſſue, and Thomas the next younger ſon is living, as is William the eldeſt brother.

Quære. THEREFORE, Does Thomas take an eſtate for life or in tail by way of contingent remainder, or by executory deviſe, under the limitations in the will, as he was *in eſſe* before the particular eſtate of freehold in Albemarle determined; as it is clearly the intention of the teſtator that no perſon in remainder ſhall take any eſtate or intereſt until a failure of iſſue male of the body of Thomas, as next younger ſon of his nephew Francis; or, Is the limitation to him void, as tending to a perpetuity? and, in that caſe, To whom now does the eſtate belong?

Mr. BOOTH'S OPINION. THE great point here will be to create a truſt, in the view of a court of equity. In this will there are various deviſes to truſtees;—a deviſe to truſtees during the minority of Albemarle; a deviſe ſubject to an eſtate to him for life; to the ſame truſtees, during his life, to preſerve contingent remainders; a deviſe to the ſame truſtees during the minority, and afterwards during the lives, of unborn perſons, to preſerve contingent remainders. I am of opinion, that, ſome way or other, a court of equity will find means to make the legal eſtate ſo far ſubſervient to its decrees, as to authoriſe the court to order ſuch ſettlement as the rules of law and equity will permit. Here is no executory deviſe, either at law or in equity, but the truſt, which may be conſtrued a direction to ſettle upon the younger brother (then unborn) of Albemarle, upon failure of

of iſſue of Albemarle's ſons: and the deviſe that makes ſuch younger brother tenant for life, with remainder to his poſſible firſt or other ſons, is a vain affectation of a perpetuity, which a court of equity will not permit to be carried into execution to the extent that the teſtator has intended it: but equity will moderate his view, and direct as ſtrict a ſettlement as the rules of equity will allow. The poſſible children of unborn children are ſuch as the law will not expect. In the Caſe of the duke of Marlborough, upon the validity of the power of revocation, and of appointing new uſes in ſtrict ſettlement, contained in the old duke of Marlborough's will, which came up from a decree of the earl of Nottingham by way of appeal to the houſe of lords, and which I mention at the end of this Opinion, it was ſaid, in the firſt printed Caſes, among the reaſons in favour of the decree, that an unborn ſon could not be made tenant for life. I obſerved to mr. Filmer, that that was not law; to which he agreed. I was not adviſed with in that Caſe, but mr. Filmer mentioned it to the ſolicitor concerned, and thereupon the printed Caſes were altered; and I ſuppoſe, mr. Hargrave can remember this. It is an error to ſay, that an unborn ſon cannot be made tenant for life: he is, in almoſt every marriage-ſettlement that is executed at this day, made tenant in tail; and, Why not tenant for life? But a limitationt to that unborn ſon's firſt ſon, is a poſſibility upon a poſſibility; and that may be, and is by moſt lawyers though to be, what the law will not endure. I think they have carried what is called the deteſtation of perpetuities too far, as we ſee in the preſent caſe; for had the younger brother of Albemarle been born two years ſooner, that is, before the death of the teſtator, the whole direction to the truſtees to entail would have been good: but, as things ſtand at preſent, this Caſe will, I conceive, be regulated by the rules laid down in the Caſe of Humberſtone and Humberſtone, which is in Prec. Chanc. 455, and in Ab. Ca. Eq. which

books I have not now with me. But there you will ſee that my lord Cowper directed to be made as ſtrict a ſettlement as the rules of law and equity would permit, and the unborn ſons to be made tenants in tail. So here teſtator having ſhewn his intention to carry the eſtate to the iſſue male of the younger brother of Albemarle (which appears by inſerting or directing a limitation to the firſt and other ſons in tail male of ſuch younger brother), the court will here, I apprehend, direct the deviſees in truſt, and all others having any legal eſtate, to make ſuch younger brother (whoſe name appears in the pedigree to be Thomas), tenant in tail male, with remainders to William, Albemarle's elder brother, and his iſſue, as in the Caſe: and Thomas may, when of age, ſuffer a recovery without the concurrence of the deviſees in truſt. Look into the Caſe of Humberſtone and Humberſtone, and in that of the preſent duke of *M.* upon the point of revocation in the great duke of *M*'s will, and you will ſee all the reaſons that govern my Opinion in this Caſe.

Herts, Nov. 6, 1768. JA. BOOTH.

FURTHER STATE OF THE SAME CASE.

Further ſtate of the ſame Caſe.

SINCE mr. Booth gave his Opinion, the Caſe has been laid before mr. Yorke for his Opinion, which is as in the paper annexed.

PLEASE to obſerve, that Thomas was thirty-five when Albemarle died, and only four years younger than Albemarle. The will was made two years after Albemarle was born, and two years before Thomas's birth: but Thomas was not born till after the death of the teſtator.

Quære.

MR. BOOTH is deſired to reconſider this Caſe, and to adviſe, Whether Thomas takes an eſtate for life or in tail, and may ſafely ſuffer a recovery to bar the remainders over, as Albemarle was in being when the teſtator died, and took an eſtate of freehold for life in poſſeſſion? and,

Whether

Whether that circumſtance will vary and diſtinguiſh this from the former adjudged Caſes?

Mr. Booth's further Opinion.

I HAVE re-conſidered this Caſe. Mr. Yorke's Opinion is dated 27th October 1768; mine the 6th November; therefore my way of conſidering the Caſe, or any argument ſimilar thereto, could not have been ſtated to him. I was in the country, and extremely engaged when I wrote the Opinion on the other ſide. I have fancied ſince that an exact copy of the will was ſent me with the Caſe, and that I ſaw ſome words in it that afforded ſome kind of argument for the whole legal eſtate's being given to the truſtees ſtronger than appears in this Caſe. I have ſince called for an exact copy of the will, but am told, that the Caſe contains all that is material therein; wherefore I have reviſed and now corrected my Opinion. If all thoſe deviſes can, without a court of equity, be made good as legal eſtates, then the deviſe to the unborn firſt ſon of an unborn perſon will be good; which is not, and cannot be law. Neither can I apprehend how the ulterior deviſe to a third perſon, upon failure of iſſue of ſuch firſt (as that in the preſent Caſe to William Baker the eldeſt ſon) can be made good, when it is ſo remote as not to take effect till after the failure of iſſue of the ſons of all thoſe poſſible perſons.

If this is not a Caſe for a court of equity, then I think Albemarle took the eſtate for life at law, with remainder to the truſtees during his life to preſerve the contingent remainders; remainder (there being no ſon of Albemarle to take the ſaid contingent remainder) to Thomas for life; and as things have happened, he is in the aforeſaid caſe tenant for life, and has the freehold, with remainder to truſtees during his life to preſerve the contingent remainders, as far as they are good in point of law.

If all the remainders are bad, then the reverſion muſt be in the teſtator's right heirs. There appears to me no kind

kind of foundation for holding it to be an executory deviſe, ſince Albemarle in the firſt inſtance took a clear indefeaſible eſtate of freehold; whereby in point of law all other ſubſequent eſtates muſt take effect, either as veſted or contingent remainders.

March 20, 1769. JA. BOOTH.

Mr. YORKE's OPINION. I HAVE peruſed mr: Booth's two Opinions upon the will of mr. Charles Baker, which are given after a very full conſideration of a nice Caſe. There is one miſtake in fact with reſpect to the duke of Marlborough's Caſe in the houſe of lords, which I argued for the duke in ſupport of the decree. The reaſons inſerted in the firſt draft of the printed Caſe were ſettled by other gentlemen, and juſt in the hurry of buſineſs during the winter, ſent to the preſs without my reading them till after they were printed. As ſoon as I read them, on the exchange of the printed Caſe and delivery of the Briefs, I ordered all thoſe delivered for the Reſpondent to be called in, and drew the firſt three Reaſons now inſerted in it with my own hand. This I did immediately after obſerving, that the mode of limiting in marriage ſettlements to the firſt and other unborn ſons of the marriage in tail, was ſtated not merely as the ordinary courſe of ſuch ſettlements, but as the rule of law; implying, as it ſeems, that a contingent uſe or remainder could not in law be limited to an unborn perſon for life. To correct this error, I drew the now Reaſons, and am very certain that no intimation came from any perſon whatſoever to me upon that ſubject; nor did I know that any copies of the printed Caſes as firſt drawn had come to the hands of mr. Booth or mr. Filmer. As to the points upon mr. Baker's will I think that there are four, *viz.* 1*mo*, Whether the limitations enure out of a truſt or legal eſtate? 2*do*, Whether Thomas the third ſon

of

of Francis takes by way of executory deviſe or contingent remainder? 3*tio*, What eſtate he takes, whether for life or in tail? And, 4*to*, If he takes for life, Whether the remainders over to his firſt and other ſons are void in law?

As to the firſt, I am of opinion, that the truſtee took only an intereſt in the rents and profits during the minority of Albemarle, to anſwer any deficiency in the perſonal eſtates for debts, and to lay out the ſurplus rents in lands. This intereſt is a chattle-intereſt in the truſtees like a tenancy by *elegit*; but does not carry a fee, as in thoſe Caſes where the land is given to the truſtees for ſale, and for ſuch purpoſes as neceſſarily veſt the legal eſtate in them by implication and conſtruction. Therefore in this Caſe, I think, the limitations to Albemarle, &c. muſt be uſes and legal eſtates.

As to the ſecond queſtion, I am of opinion, that Thomas took when he came *in eſſe* by way of contingent remainder. The antecedent freehold veſted in Albemarle, who was living at the date of his will, and named in it immediately upon the death of the teſtator. Therefore the ſubſequent limitations to perſons unborn muſt take effect by way of contingent remainders during the particular eſtate, or *eo inſtanti* that it determines.

As to the third queſtion, conſidering the lateſt authorities, particularly the Caſes of Brown and Chapman in *B. R.* and the houſe of lords, there may perhaps be ſome colour to contend, from the general manifeſt intent of the teſtator, and to preſerve the inheritance in a regular courſe of ſucceſſion in the ſons of Thomas, if thoſe cannot otherwiſe take, that Thomas the father ſhall take a remainder in tail, by implication upon the words, "in default of ſuch "iſſue, remainder to William," &c.: but I am of opinion, that this conſtruction is directly contrary to the reaſoning of the Caſes of Bamfield and Popham *, and of Langley and Baldwins †, and Attorney-General and Sutton and

* 1. Wms. 54.
† Eq. Ab. 185.

and Pamon, 1. Wms. 754; and that it would be ſtrange to ſay, that the ſons of the unborn tenant for life ſhall take ſeverally by purchaſe, as tenant in tail, when they come *in eſſe*, and that the law adjudges ſuch remainders to be void: therefore a court of law ſhould invent another method (which the teſtator has not thought of) to effectuate ſuch void ſucceſſion in theſe ſons, by veſting an eſtate-tail in the father, who can bar his ſons from the inheritance by fine or recovery the next moment. For this reaſon I am of opinion, that Thomas took a contingent remainder for life.

As to the fourth and laſt queſtion, If Thomas takes only an eſtate for life, being himſelf unborn at the teſtator's death, whether his ſons, as they come *in eſſe*, can take eſtates tail? I think, upon deliberately weighing the whole Caſe, as it is now pointed to my attention upon this matter, that they cannot, and that the remainders are void. To ſay that they can take, ſeems to be going a ſtep further than the eſtabliſhed rules and the authorities will allow. The conſtruction and effect of the will muſt be judged of as things ſtood at the date of it, or at leaſt at the death of the teſtator. By way of executory deviſe, or ſpringing uſe, the inheritance may be ſuſpended from veſting during a life or lives in being, or during the infancy of the firſt unborn tenant in tail, but it can be ſuſpended no longer. In like manner a contingent remainder muſt veſt during the life, or immediately upon the death, of the deviſee of the particular eſtate which precedes it, ſuch deviſee being *in eſſe* at the time when the will ſpeaks; but it cannot be made to wait or expect the veſting of another eſtate, prior in limitation, and equally contingent with itſelf. The law does not allow a contingency to depend upon a contingency, or one poſſibility to be thus raiſed upon another. A court of equity, in directing ſettlements of truſt eſtates, has ſometimes taken a latitude; and in the

Caſe

Caſe of Humberſtone and Humberſtone, I apprehend, from the report vol. 1. P. Wms. fol. 333. that lord Cowper made every perſon deſcribed in the will, who was before the court at the time of pronouncing his decree, a tenant for life, whether he was or was not *in eſſe* before the death of the teſtator, even though ſome of them were the ſons of the tenants for life named in the will; and then directed the unborn ſons of ſuch tenants for life to be made tenants in tail ſucceſſively, according to the courſe of ſtrict ſettlement.—If his lordſhip decreed thus, it was going a great way in aid of the intent upon an executory truſt. But in the preſent Caſe, I think that the conſtruction muſt be made upon the mere words of the will, according to the rules of law, without the aid of equity in decreeing a ſettlement.

21ſt June 1769. CHA. YORKE.

Case 19.

Whether a reverſion paſſed by a will?

Vide Atkins v Atkins, Dom. Proc. 1780.

THOMAS WIGG, ſenior, made his laſt will and teſtament as follows: Firſt, he directs that all his eſtates, whether real or perſonal, ſhould be charged with the payment of his debts, funeral expences, &c.; and ſubject thereto, he gave and deviſed to his grand-daughter Anne Mael Wigg, when ſhe ſhould attain her age of twenty-one years, or when ſhe ſhould be married with the conſent of her guardian, and to be then due and paid to her, ſo much and ſuch ſum of money as would complete and make up what her fortune was or ſhould be at the time of his death, 8000l. principal money, excluſive of, and over and above the real eſtates, and the rents, profits, and produce thereof, ſettled on her by or purſuant to the marriage articles of her father and mother, or which were by her grandfather Mael's deceaſe, or otherwiſe deſcended or come to her from him. And if the ſaid Anne Mael Wigg ſhould not live to attain her ſaid age of twenty-one years, or ſhould before that time be married without ſuch conſent as before-mentioned, he gave and deviſed ſuch the ſaid exceeding or addition to make up the ſaid 8000l. and the

ſavings

ſavings or produce thereof, together *with the remainder and reſidue of his the ſaid teſtator's eſtate, whereſoever and whatſoever*, after payment of his debts, funeral expences, and legacies, to his executor John Preſton, eſq. in truſt, nevertheleſs to be by him, his executors or adminiſtrators, placed out at intereſt, either on public or private ſecurities, during the life or lives of his the teſtator's ſon-in-law and daughter, Benjamin and ſarah Hancock, or the ſurvivor of them, and to pay the intereſt or produce thereof to the ſaid Benjamin and Sarah Handcock, or the ſurvivor of them, during theire reſpective lives: and at the deceaſe of the ſurvivor of them, upon this further truſt, to pay the ſaid principal ſum or produce of the ſaid reſidue of the eſtate to all and every the child or children of his ſaid daughter Sarah, whether born in his life-time or at the time of his deceaſe, at his and their reſpective age and ages of twenty-one years, or days of marriage, with the conſent of their parent or parents, in ſuch ſhare and proportions as his daughter Sarah Hancock ſhould, by her laſt will and teſtament, or writing in nature of her laſt will and teſtament, whether married or ſole, give, direct, or appoint; and for want of ſuch appointment, to all and every her ſaid children equally, ſhare and ſhare alike: and if all the children of his ſaid daughter Sarah ſhould die before they, or any of them, ſhould have attained the age of twenty-one years, or ſhould before ſuch age be married without the conſent of his, her, or their, parent or parents, if living, or of his executor after his deceaſe, then he gave and deviſed all the ſaid reſidue of his eſtate and truſt money in the hands of his executor, after the deceaſe of the ſaid Benjamin Hancock and his ſaid daughter, to his grand-daughter the ſaid Anne Mael Wigg, if ſhe ſhould attain her ſaid age of twenty-one years, or be married with ſuch conſent of her guardian as aforeſaid: and if his ſaid grand-daughter ſhould alſo die before her ſaid age, or be ſo married without ſuch conſent before her ſaid age, then he gave and deviſed all the ſaid reſidue of his eſtate, after the deceaſe of his ſon-in-law Benjamin Hancock, as alſo all the ſaid ſum and exceeding therein-before given to his ſaid grand-daughter to make her fortune 8000l. with all the ſavings and produce thereof, to his ſaid daughter Sarah Hancock, if ſhe ſhould be then living, or to her children, if ſhe be then deceaſed and ſhould have left any iſſue, equally, at their reſpective age and ages of twenty-one years, as before-mentioned, or if ſhe ſhould be dead without iſſue; and if all her iſſue

ſhould

ſhould alſo deceaſe during their minority, and before they or any of them ſhould become entitled to take under his will, to and amongſt all and every the children of his (the ſaid teſtator's) ſiſters, Mary Hanſard and Elizabeth Thexell, equally to be divided amongſt them. Then he goes on: "Alſo I give and deviſe all my eſtate in the "county of Norfolk, on failure both by my ſaid "daughter or grand-daughter, to my ſaid daughter Sarah "Hancock and her heirs, if ſhe be then living; or if ſhe "be deceaſed, to James Elmer, the eldeſt ſon of my "brother-in-law Elmer, and to his heirs," Then he directs his heirs to ſurrender the copyhold to the ſame uſes, under pain of receiving nothing under his will. "Alſo I "give and deviſe all my remainder and reverſion, and "all my intereſt in my eſtate at Norwich, on failure "of ſuch iſſue, to my ſon-in-law Benjamin Hancock, "during his life; to my ſaid daughter Sarah Hancock, "and her heirs, after his deceaſe, if ſhe ſhall be then living; "but if ſhe ſhall be deceaſed, then I give it the children "of my ſiſter Mary Hanſard and Elizabeth Thexell, and "their heirs." And he declared his will to be, that his executors, &c. ſhould place out and lend all ſuch monies and eſtates as he or they ſhould be poſſeſſed of, in truſt as before mentioned, and under his will, to and with his ſon-in-law the ſaid Benjamin Hancock, ſo long as he ſhould continue in buſineſs, unleſs he ſhould ſee a very great reaſon to the contrary, upon his partnerſhip account. But he willed, that his executors, &c. ſhould, with the conſent of their parents or parent, from time to time advance and pay all or any part of his, the ſaid teſtator's, fortune, for the advancement in life, or marriage, of any of their children. And he gave ſeveral other legacies, and provided for the ſafety and indemnification of his executors.

ANNE MAEL WIGG, his grand-daughter, ſurvived, but died a minor and unmarried. The deviſee over, Benjamin Hancock and his wife, levied a fine to the uſe of the ſaid Benjamin Hancock in fee. Mrs. Hancock had two ſons born in the life of the ſaid teſtator, ſtill living and of age.

THE words, "all the reſidue and remainder of my eſtate, "whatſoever and whereſoever," would have certainly compriſed the teſtator's reverſionary intereſt in the Norfolk and Norwich eſtates, if a different intention was not to be collected

Mr. DUNNINGS' OPINION.

collected from the will. But the truſts of this reſidue and remainder ſeem to indicate that no real eſtate was underſtood to be a part of it; and the ſubſequent deviſe of thoſe eſtates by name plainly imports, that the teſtator did not conſider himſelf as having previouſly diſpoſed of them. As this deviſe is ſtated, I have ſome doubt of it being to take place, in failure of iſſue by his daughter and grand-daughter. To the grand-daughter and her iſſue it had been limited by the conveyances, in conſequence of the articles on her father and mother's marriage; and the reverſion after the grand-daughter's eſtate-tail was all the teſtator had to diſpoſe of. But he does not appear to have made any diſpoſition in favour of the iſſue of his daughter; and yet there is a deviſe to her in failure of her own iſſue as well as of the grand-daughters, qualified with the condition of his then being living (which it is impoſſible ſhe ſhould be till her death; for till then, in the eye of the law, whatever may be her age, there can be no failure of iſſue); and if ſhe be then dead, to James Elmer, as to the Norfolk eſtate; and as to the Norwich, to the children of Mary Hanſard and Elizabeth Thexell. I cannot make out with any certainty what the teſtator meant by this deviſe; but I rather think that the limitation in favour of Elmer, and of the children of *M. H.* and *E. T.* is void, as being too remote, *i. e.* after a general failure of iſſue. Whether the whole deviſe is not void, in which caſe mrs. Hancock took as heir of her niece, who was heir of the teſtator, or whether mrs. Hancock is conſidered as taking an eſtate-tail by the will, is not very material, under the preſent circumſtances of the caſe; ſince her eſtate-tail, if ſhe had one, is barred by the fine and the ſurrender. It does not occur to me, that the words can be conſtrued to raiſe an eſtate-tail in the children, independent of the mother. Upon the whole, I think, though with ſome degree of doubt, that the aſſignees, ſubject to the mortgage, are entitled

entitled in fee to the freehold eſtate in Norfolk, and to the copyhold eſtate and the eſtate in Norwich, during the joint lives of the bankrupt and his wife, as it does not appear that ſhe has given up her intereſt in theſe to her huſband, further than to let in the mortgagee. As to the annuity of mrs. Thexell, I think, the real eſtate is not charged with it; but mrs. Thexell is entitled to come in under the commiſſion for the arrears, and to have an allowance for the future payments, board, and maintenance, which may be ſuppoſed to become due during the life of the bankrupt, out of what the aſſignees may receive for the bankrupt's life-intereſt in the perſonal eſtate of Thomas Wigg the elder: after his death ſhe will be entitled to the weekly payment, board, and maintenance, from thoſe to whom the eſtate will belong. As to the ſubſiſtence of the bankrupt's children, I think, the repreſentative of the truſtee has power, under the will of the teſtator, to apply to that end a reaſonable part of the intereſt of his perſonal eſtate, or with the conſent of the parents to apply a part of the principal to their advancement in life or marriage, in like manner as ſhe would have had if the father had not become a bankrupt.

Lincoln's Inn,
21ſt July 1773. JOHN DUNNING.

Mr CHAMBER'S OPINION.

THAT part of the will of Thomas Wigg the elder which regards the diſpoſition of his Norwich and Norfolk eſtate is very obſcurely worded; which makes this a queſtion of much difficulty. On the death of Ann Mael Wigg the grand-daughter, Sarah Hancock, the teſtator's daughter, was his heir at law; ſo if an eſtate tail by implication is not deviſed to her, ſhe then takes the eſtate by deſcent: but I am inclined to think, ſhe does take an eſtate-tail by implication, according to the Caſes of Newton and

and Barnardine, Moore, 127. and Walter and Drew, Comyns, 372. And if I am right in this, then the fine levied by Hancock and his wife clearly barred the eſtate-tail; but if mrs. Hancock does take ſuch an eſtate-tail, then the remainders limited to James Elmer, and to the children of Mary Hanſard and Elizabeth Thexell, are not barred by ſuch fine; but a recovery muſt be ſuffered by mrs. Hancock in order to bar ſuch remainders. And I think, the deviſes to Hanſard's and Thexell's children cannot be conſidered as executory deviſes, for they are not to take place till after an indefinite failure of iſſue of both teſtator's daughter and grand-daughter, which is too remote; and therefore, if ſuch deviſes are not good as contingent remainders, they are, in my opinion, void. But though I am inclined to think, that by recovery mr. and mrs. Hancock may bar the eſtate-tail and remainders over, yet it being a caſe of great difficulty, I cannot adviſe a purchaſer to accept the title, but ſhould adviſe a further Opinion to be taken. The weekly payment of four ſhillings is directed to be made out of the intereſt and produce of the eſtate deviſed for the benefit of the teſtator's ſon-in-law Benjamin Hancock and Sarah Hancock, and their children, which was the perſonal eſtate only; and therefore I am of opinion, that the real eſtate is not liable to the payment of the arrears and future payments. Nor can mrs. Thexell prove the ſame as a debt under the commiſſion againſt Hancock, but muſt come upon the executor, to be paid out of the aſſets of the teſtator, Thomas Wigg the elder. It ſeems as if the teſtator meant, that a part of the intereſt and produce of the money given to mr. Preſton ſhould be applied by him for the ſubſiſtence of mr. Hancock's children; and I am inclined to think, that on application to the court of chancery ſome ſmall allowance would be made then; but I think, they have

no

no power to pay any part of the principal, during mr. Hancock's life, to the children.

10th June 1773. JOHN CHAMBER.

I HAVE peruſed this Caſe, and the copy of mr. Thomas Wigg's will; and I am of opinion, that the bequeſt contained relates only to that part of the perſonal eſtate given to the grand-daughter Anne Mael Wigg, in order to make her fortune 8000l. principal money, and the reſidue of the perſonal eſtate that ſhould remain after payment of the teſtator's debts, funeral expences, &c.; form the ſame are given to the executor in truſt to be by him, his executors, &c. placed out at intereſt, either in public or private ſecurities, &c. Mr. Duan's Opinion.

It ſeems to be very difficult to ſay with any certainty, what eſtate mr. Hancock took in the lands in the county of Norfolk; and I think this queſtion is very proper for the determination of a court of judicature. Though the part of the will whereby that eſtate is deviſed ſeems only to relate thereunto, yet the teſtator ſeems to have in view the diſpoſition which he had made of the reſidue of his perſonal eſtate, and of the money given to his grand-daughter in augmentation of her perſonal fortune. It is deviſed, on failure of iſſue both by his ſaid daughter or grand-daughter, to his daughter Sarah Hancock and her heirs, if ſhe ſhould be then living; or if ſhe ſhould be deceaſed, to James Elmer. The bequeſt of the reſidue of the perſonal eſtate, and of the money given to his grand-daughter in addition to her fortune, if ſhe ſhould die under the age of twenty-one-years, as to the executor in truſt, to lay the ſame out at intereſt, and to pay the produce thereof to mr. and mrs. Hancock, and the ſurvivor, during their reſpective lives and the life of the ſurvivor; and on the deceaſe of the ſurvivor, to pay the principal ſum or produce

of

of the ſaid reſidue of his eſtate to all and every the child or children of his ſaid daughter. I am ſtrongly inclined to think, that the teſtator intended that the eſtate in the county of Norfolk ſhould go in the ſame manner. But I doubt very much, whether his intention can take place, as there is no expreſs deviſe to mr. or mrs. Hancock for their lives, and neither ſhe nor he can take any eſtate or intereſt unleſs ſhe is deemed tenant in tail by implication. It is plain, the teſtator did not intend that mrs. Hancock ſhould have the reverſion, or that mr. Elmer ſhould have the eſtates limited to him, but in caſe of failure of iſſue of his daughter and grand-daughter. Therefore I am inclined to be of opinion, that in order to anſwer the intention of the teſtator, mrs. Hancock muſt be conſidered as tenant in tail by implication, otherwiſe her children never could take. But though theſe at preſent are my thoughts, I do not adviſe any perſon to purchaſe without the determination of ſome of the courts at Weſtminſter-hall. If mrs. Hancock is conſidered as tenant in tail, the fine levied by mr. and mrs. Hancock barred her own iſſue, but not the contingent remainder to mrs. Elmer, and it would be proper to ſuffer a common recovery; but as to the copyhold part of the eſtate, it muſt be made appear, Whether recoveries are ſuffered in the court of the manor? If the cuſtom allows of recoveries, there muſt be one ſuffered in the court of the mannor; if not, ſurrenders will be ſufficient.

Lincoln's Inn Hall, MATT. DUANE.
3*d Sept.* 1773.

THE caſe of Newton and Barnardine, to which mr. Chamber refers, is thus: Coſham had three ſons, Thomas, Richard, and Gilbert. Thomas died leaving his wife *enſeint*, and the father (Coſham) deviſed as follows: "To the child my ſon Thomas's wife now goes withal "twenty nobles yearly, to be paid in the uſe of the child "for

" for twenty years; and if my ſon Richard die before he " has iſſue of his body, ſo that my land deſcend to Gil- " bert before he comes to twenty-one years of age, then " mine executors ſhall occupy it until Gilbert be twenty- " one years of age." The father died; Richard enters, and had a daughter, married afterwards to the plaintiff; and after many arguments it was adjudged, that Richard took an eſtate tail by implication. Moor, 107. Notes on the foregoing Caſe.

The Caſe of walter and Drew, alſo referred to by him, is thus: Teſtator having two ſons deviſes as follows: " It is my will, that if my ſon William Weeks ſhall hap- " pen to die, and leave no iſſue of his body lawfully " to be begotten, that then in that caſe, and not other- " wiſe, after the death of the ſaid William my ſon, I " give and bequeath all my lands of inheritance in *L.* " unto the ſaid Richard my ſon, to have and to hold the " ſame, after the death of the ſaid William, to him " and his heirs." It was inſiſted, that the deviſe to Richard was executory, there being no particular eſtate, but only a deſignation of the time when Richard was to take. A man deviſed to his ſon after the death of his wife: decreed that the wife took nothing. 2. Leo. 226. 2. Jones. 98. 2. Lev. 207. See alſo Gardiner and Sheldon, Vaughan, 295. 262. Here the eſtate was not to take effect till after the death of the ſon and daughters without iſſue, which was too remote a contingency; but here the contingency was to take effect upon the death of William; for the words are not, " if William " die without iſſue," but, " if he die and leave no iſſue;" which are tantamount to ſaying, " if he die leaving " no iſſue at the time of his death." and this is enforced by the ſubſequent words, " if William die and leave " no iſſue, then in that caſe, and not otherwiſe, " after the death of the ſaid William, I give the " ſame to Richard, to hold after the death of " the ſaid William, to him and his heirs;" but it appears that he intended Richard ſhould have the lands immediately upon the death of William. But it was anſwered, that no one could take an executory deviſe but he who cannot take any other way: here he may take by way of remainder, and here by the words it appears to be the teſtator's intention, that William his eldeſt ſon ſhould take in the firſt place; and the intention of the teſtator is the only rule for the conſtruction of wills. So 9. Co. 127. a man deviſed to his wife; and then ſays " after

Notes on the foregoing Case.

"her death my ſon William is to have it; and if he "die, his ſon is to "have it;" it was held, William took an eſtate-tail. So Mod. 127. there were no words of gift, yet it was held a good deviſe. So 1. Roll. Abr. 836. 2. Cro. 415. And in the preſent caſe a recovery had been ſuffered by William upon the Opinions of ſerjeant Pemberton and Levinz. Baron Probyn, at whoſe chambers it was argued from the aſſizes in Cornwall, gave his opinion, that it was an eſtate-tail by implication to William; and ſaid, that an eſtate ſhall never paſs by way of executory deviſe, but where the deviſee cannot take any other way. But here William took by the will; for it is a neceſſary implication that he ſhall have it to him and his heirs; for the heir ſhall take by the will though he is not named, and though there is no deviſe to him in expreſs words. See Co. 128. Mo. 127. 1. Roll. Abr. 838. 2. Cro. 415.

See Titles "BEQUEST," "DEVISE."

WRECK.

CASE 1.

WHETHER, the leſſees, under the grant of 3d Nov. 18. Geo. 2. are entitled to wrecks happening within the manor of Ambell? and if ſo, are they entitled to the wine lately wrecked within that manor, and to the ſhip that was drove on the Salt Pan Rock, whether the owners make any claim thereto or not? and, whether the freeholders within the ſaid manor have any ſort of right to this wreck?

Quære.

MR. BOOTH'S OPINION.

Whether the grantee for years, under the crown, of a ſeignory in which a right of wreck had been, before its forfeiture, exerciſed, was entitled to wreck, under the general words of "all privileges and royalties, rights, members, and appurte-"nances, thereunto belonging."

THE right of having wrecks of the ſea is a royal franchiſe, and one of the flowers belonging to the crown. No ſubject can have wreck but by grant or charter from the crown, or by preſcription. Preſcription preſuppoſes a grant, and ſupplies the want of it; therefore an expreſs grant is always to be ſeen or to be preſumed. When a ſubject who has wreck by grant or preſcription commits treaſon, the right or franchiſe of having wreck is remitted to the crown, by forfeiture of the land or ſeignory through or upon which the right of wreck is to be exerciſed. If the king regrants the land or ſeignory to a ſtranger, ſuch grantee ſhall not have wreck again without words ſufficient in the patent, expreſsly granting to the grantee a right to take wreck there. In the grant of the 3. Nov. 18. Geo. 2. there are no ſuch words as will operate as a new grant. And as this is the caſe of the crown, and but a leaſe for years, I am very clear the grantees have no right, even under the words *all privileges and royalties, rights, members and appurtenances, thereunto belonging*; for wreck cannot, as I conceive, be ſaid to be *belonging* to a manor, or to a lordſhip, or to lands.

BESIDES, if the owner has any marks by which he can prove that the hogſheads were his, the ſame will not be deemed to be wrecked, but muſt be reſtored to him; and the law has, of late, in favour of merchants and merchandiſe, been taken to be ſo, conformable to Bracton, who ſays, that merchandiſe, &c. ſhall not be wreck, *ſi certa ſigna oppoſita fuerint mercibus et aliis rebus, &c. Vid.* 2. Inſt. 167, 168.

Lincoln's Inn, JA. BOOTH.
27th April 1755.

CASE 2. *The* DUKE OF NORFOLK'S CASE, *concerning a diſputed Claim, between him and* Mr. BIDDULPH, *to ſuch* WRECKS *as happen within the Manor of* Bramber, *in* Suſſex.

The ſeveral OPINIONS of Mr. FAZAKERLEY, SERJEANT PRIME, and Mr. PRATT, upon the claim of the duke of Norfolk to the right of wreck within the honour of Bramber.

HIS grace derives his title under ſeveral grants made by the crown to his anceſtors before the reign of king James I. of the aforeſaid and divers other wrecks and royalties, in the ſaid county of Suſſex, and elſewhere.

And mr. Biddulph founds his title thereto upon a grant made long after to one of his anceſtors, of the wrecks now in queſtion, by king James the firſt, and alſo upon a long enjoyment under it; to evidence which enjoyment he produces the copy of a claim made and allowed of a cable and anchor upon the premiſes, before a court of vice-admiralty held for that county in the year 1683, when the late king James II. then duke of York, was lord high admiral of England; and likewiſe a verdict in an action of trover brought and tried by one of his anceſtors, in the ſixth of the late queen, againſt a parſon who had poſſeſſed himſelf of a hogſhead of wine that was thrown a wreck upon part of the ſaid manor; beſides ſome entries in court rolls of the ſaid manor of wrecks from time to time ſeized for their uſe in the ſaid manor.

BUT for his grace, beſides the ſaid firſt mentioned grants, it is inſiſted, that there have been ſeveral ſeizures from

from time to time likewiſe made on the part of his anceſtors, though not, perhaps, ſo frequently, nor ſo diligently purſued, on account of the minorities and other accidents that have happened in the family, and more particularly the neglect and careleſſneſs of agents, eſpecially during the life of duke Henry, his grace's uncle, when the family affairs ſuffered greatly by remiſſneſs and miſmanagement. But what is princpially relied upon is, the priority of the grants ſo made as aforeſaid to his anceſtors of all the wrecks within the ſaid manors, as they are apprehended to be inheritances of ſuch a nature as cannot well be affected by any of the ſtatutes of limitations.

Mr. FAZAKERLEY's OPINION.

I SUPPOSE the grants under which each of the parties claims this right have ſufficiently deſcribed the wrecks in queſtion; and if ſo I am of opinion, that the firſt grant to the duke of Norfolk will prevail againſt the ſubſequent grant, and under which mr. Biddulph claims; and I do not think the ſtatutes of limitations have any effect upon the preſent caſe.

4th Auguſt 1742. N. FAZAKERLEY.

Mr. PRIME's OPINION on the foregoing Caſe.

I HAVE peruſed the ſtate of the facts, and conſidered the ſeveral arguments above ſtated and urged, and am of opinion, that there is very little likelihood of ſucceſs in the defence of this action, and therefore cannot adviſe his grace the duke of Norfolk to undertake or engage in it. If, indeed, his grace is determined to defend the cauſe, it were to be wiſhed that ſome inſtances could be given in evidence of an enjoyment of the right claimed by his grace, either in his own time or in the time of ſome of his moſt noble anceſtors, ſince the year 1330 abovementioned; a kind of evidence that ſeems to me to be neceſſary for a proper defence; and the want of ſuch evidence is the principal ground of my diſtruſting the ſucceſs of a defence. And as I conſider this caſe in ſo diſcouraging a light, I can by no means think it proper for his grace to apply for a trial at bar.

BY

Mr. FAZAKERLEY's further OPINION given the 7th of February, 1755.

BY the grant of 7. Jac. 1. the firſt wreck is expreſsly granted; and therefore it will be incumbent on the duke to give evidence of ſome antecedent right; which if he does to the ſatisfaction of the court, it will avoid the grant of wreck under the grant 7. Jac. 1. Now this is done by the grant of the firſt of queen Mary 1554, if it does not claſh with the right you claim in the honour of Bramber; which I mention, becauſe it does not appear to me whether it does or not. As to the title to wreck within the honour of Bramber, you have two ſtrong pieces of evidence of an antecedent right to that claimed to the plaintiff; and if this be eſtabliſhed, it makes good way to extend the general words of the grant of 6. Jac. 1. to wrecks. I cannot ſay that there are ſo many inſtances of ſeizing wrecks on the part of the duke and his anceſtors as to make this a clear caſe. But as giving up this cauſe will be a very ſtrong ſubmiſſion to the plaintiff's right, and that it will be ſcarcely overcome in any future trial, I cannot think it adviſeable for the duke to give up his right, but to defend the cauſe, eſpecially upon the footing of the grant of the firſt of queen Mary 1554: and if you can get more inſtances of ſeizures, both ancient and modern, they would ſtrongly ſupport the duke's right, which is much weakened for want of more ſuch inſtances. As to the laſt part of the queſtion, it is a queſtion, indeed, often aſked, though it is utterly impoſſible to give a material anſwer without ſtating what evidence you have which is not in my power to know. All that I can ſay is, that if you have any records, grants, or deeds, or inſtances of ſeizures, or other evidence of the enjoyment of this right, or if it be the general reputation that the duke has this right, or that he or his agents have exerciſed this right or that witneſſes have heard other perſons now dead ſay that the duke had or exerciſed the right of wreck, it will be very proper evidence to ſtrengthen and corroborate the duke's right.

I HAVE

I HAVE peruſed the general words of grant in the charter of 6. Jac. 1. and am of opinion, they are ſufficient to carry all the franchiſes that the lords of the honour of Bramber enjoyed, either by charter or preſcription, before the duke of Norfolk's attainder; and that they enjoyed the franchiſes of wreck throughout the honour, is clear from the old records ſtated in this caſe; by which it appears this very right of wreck was allowed in eyre; conſequently the duke of Norfolk is now entitled to wreck within the honour, under the grant of Jac. 1. which no uſage or grant ſince that time can take away. The only thing that can deprive him is ſome grant of wreck between the attainder and 6. Jac. 1. The duke muſt reſt upon this at the trial, and by no means ſuffer the uſage to go to the jury, but inſiſt upon a ſpecial verdict.

Mr. PRATT's OPINION on the foregoing Caſe, February 19, 1755.

See next Caſe.

N. B. I SUPPOSE, among the liberties claimed by Will. de Breuſe, this of wreck is expreſsly mentioned in the record.

I TAKE it for granted likewiſe that Lanceing is within the honour of Bramber.

CASE 3.

RIGHT of wreck of the ſea is a franchiſe derived from the crown.

The joint OPINIONS of Mr. FILMER and Mr. BOOTH upon the claim of lord and lady Arundel to a right of wreck within the hundred and manor of Pu ſi h; and upon the evidence admiſſible to ſubſtantiate ſuch claim.

FRANCHISES are of two ſorts; thoſe that lie in grant, and thoſe that lie in preſcription.

RIGHTS to franchiſes lying in grant of charter, which are ſuch as could have no exiſtence till created by an actual charter, ſuch as fairs, markets, felons goods, conuſance of pleas, hundred courts, &c. muſt be ſupported by ſhewing the expreſs grant thereof, if within time of memory, by the crown. If they were before the time of memory,

memory, then inaſmuch as they cannot be pleaded as records (though ſuch grants are extant), they muſt have the aid of ſome other matter of record within the time of memory to make them available; as allowances thereof in eyre, or ſome judgment of record in ſome of the king's courts, in ſupport and affirmance thereof, or ſome confirmation by the crown by letters patent pleadable as a record

RIGHTS to franchiſes by preſcription, ſuch as waifs, eſtrays, wreck of the ſea, &c. which are ſuch as owe not their exiſtence to creation, but were originally parcel of the flowers of the crown, may be ſupported from uſage time immemorial, without the aid of any record; that is, from ſo long that no man alive hath heard or had any knowledge, by hearſay or by writing, to the contrary; for this induces a preſumption that the right had its origin at firſt from ſome ancient grant made before the time of memory, that is, before the time of Richard the Firſt, which is the time of preſcription fixed by the ſtatute of Weſtm. 1. *anno* 1. Edw. 1. c. 38.

Co. Lit. 133.

BETWEEN ſubject and ſubject, rights have their foundation as well from preſcription as under actual grants. But as to franchiſes, in regard that they are, in ſome meaſure, regal rights, and are always preſumed to be derived from the crown, thoſe of the firſt claſs are not preſcriptible at law; but thoſe of the ſecond claſs, ſuch as wreck of the ſea, are; and the right thereto is ſupportable by uſage, without the aid of any record.

HAVING premiſed thus much, we are of opinion:

1ſt, THAT as the grant of confirmation from king Henry, 2. *anno* 1154, which was before the time of memory, to Richard Pincerne (and which recites the original grant from Robert of Glouceſter of the manor of Conerton and the liberties) is recited in the *inſpeximus* and charter of confirmation of the 16th July, 21. Eliz. 1579; and as the grant or writing from Richard earl of Cornwall to John

John of Conerton, of the hundred of Penwith, is recited and confirmed inthe same *inſpeximus* or charter of confirmation; and as the judgment in the *quo warranto* of *Paſch.* 12. Edw. 1. was in favour of Alice de la Hurne, then owner of the manor and hundred, and ſhe was diſmiſſed with the hundred and manor, and with the liberties ſhe claimed; and as in the other *quo warranto*, Hil. 10. Eiz. 167, the attorney general entered a *non vult proſequi*, and the charter of confirmation of 1579, and the mandatory writ, in nature of a writ *de libertatibus allocandis*, followed in the year 1580 thereupon; we think there is full and ſufficient proof, that Lord and lady Arundel have (in the right of lady Arundel) a legal title and claim to the ſaid manor and hundred, and to ſuch rights and liberties as are appurtenant or appendant thereto, or could be deemed to paſs by the original grants aforeſaid. Fitz. Nat. Brev.

2d, THAT as there is a continued ſeries of proof that the lords and owners of the manor and hundred have exerciſed the right of ſeizing and taking wreck of the ſea, throughout the whole manor and hundred, they have an equal right, title, and claim, to take and enjoy wrecks of the ſea throughout the whole manor and hundred: but then this right is to be claimed by uſage and preſcription; for there is no expreſs grant of wreck, nor any expreſs claim with allowance thereof, in any of the inſtruments or proceedings here ſtated.

3d, BUT nevertheleſs, if any lords of any particular manors within this hundred can prove, from invariable uſage for a long courſe of years, that they have enjoyed wreck within their own diſtricts without diſturbance, ſuch lords will be able to maintain their claim by preſcription againſt the claim of lord and lady Arundel; for their grants being to be preſumed to be before the time of memory, will then be alſo preſumed to be prior to the grants to lady Arundel's anceſtors; in which caſe theſe latter

latter grants neither can nor could derogate from or invalidate ſuch prior grants. And it will be no impeachment to the right of lady Arundel's anceſtors in the reſt of the hundred at large; for as they claimed under their grant a particular right or franchiſe in that territory or diſtrict which the manor and hundred formed diſtinct from the reſt of the county of Cornwall, ſo ſuch particular lords would claim their rights and franchiſes in their own territories, diſtinct and exempt from the reſt of the hundred. Such may be the claim of the lord of Tehidly; and ſuch alſo may be thoſe of the lords of Laniſley, Mountſbay, and the like. But in truth, if theſe laſt have any ſuch rights, they ſeem to have crept into them by the negligence of the Arundel family, and by encroachment.

4th, We think the court rolls, the bailiff's book, the preſentments, the findings by juries, the ſtewards and officers accounts, rentals, &c. and in general, all the antient papers found at Lanherne, are evidence; but as to the depoſitions in the court of admiralty, we muſt refer to what mr. Fazakerley has ſaid in his opinion concerning the ſame, as alſo to what further he has obſerved upon this caſe.

Vide the preceding Caſe.

In a cauſe between mr. Biddulph, lord of the manor of Lanceing, and the duke of Norfolk, lord of the rape and hundred of Bramber in Suſſex, touching wreck of the ſea, tried laſt Lent aſſizes, at eaſt Grinſtead, before ſir Eardley Wilmot, court rolls, bailiff's books, ſtewards accounts, preſentments of homages and juries, and the like, were all admitted, and the duke's pedigree, claiming from the Mowbrays, &c. and admitted upon ſlender evidence. The verdict was againſt the lord of the hundred, upon the evidence of an uninterrupted uſage for about ninety years.

As to the method of proceeding againſt the lord of Daniſley for taking the hogſhead of wine, we think you had beſt bring an action of trover. When proceſs is ſerved,

ſerved, you may then file a bill in equity, to perpetuate the teſtimony of the old witneſſes, and proceed to take their depoſitions *de bene eſſe*, and then try the action of trover at law; or you may get the attorney general to file an information in nature of a *quo warranto*, againſt the lord of Laniſley for claiming to have wreck in Laniſley But the laſt mentioned depoſitions will be of no uſe inthat cauſe. It is to be recommended to lord and lady Arundel to revive the practice of keeping courts for the manor and hundred in the antient manner, and to employ ſkilful perſons therein, eſpecially for the firſt three or four years; and ſome ſkilful perſon ſhould be employed to collect and gather together the evidence and proofs neceſſary on the approaching trials.

Lincoln's Inn,
18*th Auguſt* 1755.

BEV. FILMER.
JA. BOOTH.

FINIS.

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